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THE UNITED STATES SENATE AND THE INTERNATIONAL COURT

BY

FRANCES KELLOR
AUTHOR OF "SECURITY AGAINST WAR"
AND
ANTONIA HATVANY
COLLABORATOR

NEW YORK
THOMAS SELTZER
1925

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PRINTED IN THE UNITED STATES OF AMERICA

AUTHOR'S NOTE

This volume continues the history of the management by the League of Nations of the settlement of international controversies, as related in *Security Against War,* published in October, 1924. It indicates the position of the United States in relation to the system of pacific settlement established under the League of Nations, of which organization the Permanent Court of International Justice forms a part.

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SYNOPSIS

Chapter I. Design of the Court: 1. The Peace Conference at Paris authorized the establishment of the Permanent Court of International Justice. 2. Jurisdiction conferred upon the Court by the Treaties was the reason for its immediate organization. 3. The Council appointed an Advisory Committee of Jurists to prepare plans. 4. The recommendations of the Committee were submitted to the Council of the League. 5. The Council proposed modifications in the draft Scheme. 6. The Assembly further modified and then adopted the draft Scheme as altered by the Council. 7. These changes substantially altered the character and functions of the Court as recommended by the Advisory Committee of Jurists. 8. The Statute came into being through a resolution passed by the Assembly, providing for a Protocol of Signature. 9. Signature to the Protocol is limited to members of the League and to states mentioned in the Annex to the Covenant. 10. This policy of exclusion was abandoned in later protocols. 11. No provision is made for withdrawal from the Statute. 12. Provisions for denunciation have been made in other instruments. 13. Revision of the Statute is nowhere provided for, leaving the right, by omission, to the Assembly. 14. Revision of the Statute by the Assembly may extend the substantive competence of the League with respect to its members. 15. Revision may be effected by the Assembly through independent acts. 16. The Statute contains no provisions for sanctions, leaving the right, by omission, to the Covenant. 17. The Court was intended to be and is the judicial organ of the League. 18. The general policies of the Court are defined by the League of Nations. 19. The basic design of the Court makes no adequate provision for the proper functioning of adherent non-members of the League. 20. The proposal for the adherence of the United States stipulating that the Statute shall not be amended without the consent of this government is inadequate.

Chapter II. Organization of the Court: 21. The Court is organized in addition to the Permanent Court of Arbitration and parties

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Chapter III. Nomination of Judges: 35. The Court is composed of independent judges elected regardless of nationality. 36. Judges are nominated by members of the League and States mentioned in the Annex to the Covenant. 37. The use of the Hague Organization places it in a subordinate capacity in the League System. 38. Nominations are set in motion by the League. 39. The procedure for making nominations is not binding upon the nominators. 40. Nominations thus made are not binding upon the electors representing the country of the national group. 41. The machinery for nominations is controlled by the League. 42. The League is not dependent upon the Hague Organization. 43. The use of the Hague groups for nominations is not authorized by the Hague Convention. 44. A convention negotiated and ratified for one purpose is used for other purposes not ratified. 45. Proposals for adherence of the United States do not contemplate alteration of the present plan.

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Chapter V. National Judges: 58. It is an accepted principle of law that no one can be a judge in his own case. 59. The problem before the Advisory Committee of Jurists involved the guarantee of impartiality. 60. Differences of opinion manifested at The Hague in 1907 reappeared in 1920. 61. The Statute maintains the principle of national judges. 62. Special provisions apply to judges chosen *ad hoc*. 63. National judges are the representatives of the League. 64. Judges appointed *ad hoc* furnish an exception to the rule that judges represent the League. 65. Equality of national judges is not maintained in the Chamber of Summary Procedure. 66. Equality of national judges is maintained in the Special Chambers for labor and for transit. 67. Equality of judges is not maintained when the Court renders an advisory opinion. 68. The principle of national judges as applied to advisory opinions favors the great Powers. 69. The adherence of the United States should be conditioned upon equal representation under all circumstances.

Chapter VI. Right of Access: 70. By accessibility is meant the use of the Court. 71. The Court is directly accessible to any State or member of the League. 72. The Court is directly and unconditionally accessible to members of the League as a matter of right. 73. Right of unconditional direct access may be lost through withdrawal from the League. 74. Only states may have direct access as parties. 75. An exception to direct ac-

cess occurs whenever a state is under a mandate, protectorate or guardian. 76. States may have direct access on behalf of a private person if such a person is one over whom a state claims the right of protection. 77. The Court is directly accessible to states mentioned in the Annex to the Covenant. 78. States not mentioned in the Annex have direct access to the Court under a Declaration prescribed by the Council. 79. The Declaration may be particular for a case or general for all disputes. 80. The Council alone may change the Declaration. 81. The right of the Council to make regulations is based on the theory of protection of members of the League. 82. States may have direct access through treaty provisions. 83. Direct access may be had to the Court for the purpose of executing the terms of a treaty. 84. Whether states engaged in war may have direct access to the Court has not been determined. 85. Access in litigious matters may be had through the Council and Assembly. 86. Access in non-litigious matters may be had by the Council or Assembly. 87. Right of access for advisory opinions may bring international institutions before the Court. 88. The Court is accessible at all times. 89. Disputes as to accessibility of the Court are decided by the Court. 90. Proposals for adherence of the United States contain no reference to right of access.

Chapter VII. Obligatory Jurisdiction under the Statute: 91. The jurisdiction of the Court is in principle based upon agreement between the parties. 92. The Advisory Committee of Jurists undertook to broaden the scope of Article 14. 93. The opposition of the great Powers defeated this liberal interpretation. 94. The substitute proposal of the great Powers was opposed by the small Powers and resulted in the optional clause. 95. Whatever obligatory jurisdiction the Court possesses under its Statute is derived from the optional clause. 96. The Court decides when it has jurisdiction in legal disputes. 97. The optional clause extends the principle of Article 13 of the Covenant to the Court. 98. The optional clause may be accepted unconditionally or with reservations. 99. Rules adopted by the Council for non-member states offer an exception to the rule of reciprocity. 100. The optional clause has not been ratified by any great Power. 101. The measure of jurisdiction conferred by the optional clause has

been negligible. 102. The impotence of the optional clause is indicated by the forcible settlement of disputes. 103. The optional clause is sufficiently elastic to permit of any reservation which states deem necessary. 104. The elasticity of the optional clause as interpreted by the Assembly is the subject of a difference of opinion. 105. Jurisdiction conferred by the optional clause is not stable. 106. The Harding-Hughes proposal for United States adherence does not recommend acceptance of the optional clause.

Chapter VIII. Jurisdiction under Treaties: 107. Treaties and conventions in force confer jurisdiction upon the Court. 108. Obligatory jurisdiction is conferred by the Versailles Treaty in labor disputes. 109. Obligatory jurisdiction is conferred by the Versailles Treaty in transit controversies. 110. Obligatory jurisdiction is conferred by international conventions relating to transit. 111. Obligatory jurisdiction is conferred by mandates. 112. Obligatory jurisdiction is conferred by conventions resulting from the Peace Treaties. 113. Interpretation of the Peace Treaties in general was not intended to come within the obligatory jurisdiction of the Court. 114. Obligatory jurisdiction conferred by the multiplicity of treaties lacks stability and uniformity. 115. Optional jurisdiction is conferred by treaties of conciliation and political agreements. 116. Optional jurisdiction is conferred by commercial treaties. 117. Optional jurisdiction is conferred by the Covenant. 118. Optional jurisdiction is conferred by certain political conventions. 119. Optional jurisdiction is conferred by treaties of alliance and security. 120. Jurisdiction may be conferred upon the Court through intervention by the League in matters of transit. 121. Jurisdiction may be conferred through intervention by the League in questions of minorities. 122. Jurisdiction may be conferred through conventions negotiated by the League. 123. Direct access to the Court appears to be difficult when jurisdiction may be invoked through intervention of the League. 124. Jurisdiction conferred by treaties where members of the League are parties is convertible into advisory jurisdiction. 125. It is possible to exaggerate the increase in the judicial settlements which may be represented by agreements conferring jurisdiction on the Court. 126. The United States has indicated its intention

to confer jurisdiction upon the Court through treaties, when the Senate assents to adherence.

Chapter IX. Jurisdiction Over Non-judicial Matters: 127. The Court has jurisdiction over matters other than disputes. 128. Article 36 extends this jurisdiction to non-judicial matters. 129. The Court may advise on non-judicial matters. 130. The Court or its President may appoint arbitrators. 131. The Court may make nominations for national offices. 132. The Court has established a precedent in undertaking duties of an extra-territorial character. 133. Extra-territorial duties performed by the Court may establish a policy at variance with national practice. 134. The Court appears to be without adequate authority. 135. Certain principles are established by these instances. 136. The policy of the United States is set forth in its national practice. 137. States adhering to the Statute but not associated in joint political endeavors in Europe lack the protection afforded to members of the League.

Chapter X. Advisory Opinions under the Covenant: 138. The Court possesses advisory jurisdiction. 139. Absence of mention in the Statute is due to the Assembly. 140. Origin of the provision is British. 141. The practice followed by the Council under Article 14 is a departure from the British rule. 142. Only the Council or Assembly may request advisory opinions. 143. States and international organizations may obtain opinions through the Council or Assembly. 144. Agreements between the Council and states have been made to submit matters for opinions. 145. The scope of the subject matter is unlimited. 146. Consent of parties is not necessary for submission of the question. 147. Questions may be framed either by parties or the Council. 148. Whether the vote of the Council shall be unanimous in taking a decision to request an opinion is not determined. 149. The Court regards as discretionary its obligation to render opinions. 150. The Council regards as mandatory the same obligation. 151. The Court has had formulated general conclusions underlying advisory practice. 152. With these conclusions the Council is not in entire accord. 153. The rules of the Court prescribe no fixed procedure. 154. The Court has thus far followed the procedure laid down for judgments. 155. Certain of these rules are not applicable to advisory opinions. 156. Opinions are not generally

regarded as the exercise of a judicial function. 157. Opinions in themselves do not settle a dispute for they are incomplete. 158. Opinions are not binding. 159. For members of the League opinions are applicable within the terms of the Covenant. 160. No matter submitted for an opinion has been submitted for a judgment. 161. The rules of the Court prevent secret or confidential opinions. 162. Proposals in the United States indicate a division of opinion. 163. The position of the Court in the matter of Eastern Carelia does not offer a sufficient guarantee to non-members of the League. 164. None of the proposals pending in the Senate affect the questions of fundamental concern to the United States.

Chapter XI. Advisory Opinions in the United States: 165. The Federal Judiciary does not offer a precedent for the practice of advisory opinions in the Court of Justice. 166. Nine states have made provisions for advisory opinions. 167. The policy adopted by these states establishes a common principle. 168. Four states have experimented with advisory opinions and rejected them. 169. Two states have adopted advisory opinions with respect to criminal cases. 170. The practice followed in the nine states which have advisory opinions is derived from the British practice. 171. Only the governor or branches of the legislature may request opinions. 172. Advisory opinions are delivered by the justices not by the Court. 173. The practice of advisory opinions is limited. 174. These limitations preclude the submission of actual controversies or questions involving private rights. 175. State justices strictly construe these provisions. 176. It is not mandatory upon the justices to grant opinions whenever requested. 177. Advisory opinions are not binding upon either the governor or legislature. 178. Advisory opinions are not binding upon the Court. 179. Opinions are reported among regular decisions but not for the purpose of using them as precedents. 180. The proceedings are informal and non-judicial. 181. The rendering of advisory opinions is a non-judicial function. 182. Advisory opinions as practiced in the United States do not justify adherence to the Court on the basis of precedent and analogy.

Chapter XII. Jurisdiction With Respect to International Labor: 183. The Treaty of Versailles provides an organization for improvement of labor conditions. 184. The Treaty provides

for the calling of General Labor Conferences. 185. The duty of member states is to secure adoption of proposals agreed to by General Conferences. 186. The Court is authorized to indicate sanctions in connection with disputes arising under Article 405 of the Treaty of Versailles. 187. For the purpose of hearing labor disputes a special chamber is created under the Court Statute. 188. Matters arising under the labor provisions have been submitted for interpretation. 189. Direct access for purposes of a judgment may become indirect access for purposes of advice. 190. Injunctions against free discussion and research may be sought through advisory opinions. 191. Intervention by the Council renders useless the Special Chamber for labor cases. 192. The question whether adherence to the Court Statute would prejudice the position of American labor is debatable.

Chapter XIII. Jurisdiction Concerning Transit and Communications: 193. The Treaty of Versailles confers a limited amount of jurisdiction upon the Court. 194. Jurisdiction with respect to international rivers is conferred upon the Court. 195. Jurisdiction with respect to the general interpretation of the transit provisions is not conferred upon the Court. 196. Framing of final provisions on transit was part of a general task laid upon the League. 197. The first Assembly undertook to summon a general Conference on freedom of communication and transit. 198. This Conference extended the jurisdiction of the Court. 199. The competence thus conferred constitutes the Court a tribunal of appeal with optional jurisdiction. 200. Recourse is obligatory in one instance. 201. The provisions authorized by the League have been applied in one instance. 202. The Court has obligatory jurisdiction under certain transit clauses of the Treaty. 203. One appeal has been made under these clauses. 204. The Court possesses a two-fold jurisdiction in transit matters. 205. Adoption of special provisions in the Statute is due to a British proposal. 206. Article 27 of the Statute provides for a special chamber. 207. This special chamber appears to duplicate the work of the League.

Chapter XIV. Jurisdiction over Domestic Questions: 208. Determination of what constitutes a domestic question is ordinarily

the right of states. 209. Members of the League have assigned to the Council determination of this right. 210. The Covenant undertakes to confer a similar right for non-members of the League. 211. Any domestic question may be submitted to the Court for an advisory opinion. 212. Principles which will determine whether a matter is domestic or international have not been ascertained. 213. The Geneva Protocol undertook to change the existing rule under the Covenant. 214. The precise meaning of the proposal has been the subject of varying interpretations. 215. Provisions of the Geneva Protocol were intended to apply to non-member states. 216. The position of a state adhering to the Statute but remaining aloof from the political organization which determines the policies of the Court calls for additional protection of the United States.

Chapter XV. Competence with Respect to War: 217. The general prevention of war is vested in the League of Nations by virtue of the Covenant and the partial prevention of war is vested in treaties of mutual guarantee. 218. The general authorization to deal with threats of war is granted to the League under the Covenant. 219. Sixteen disputes have been called to the attention of the League under Article 11. 220. Disputes involving threats of war have not been submitted to the Council through invoking the powers of the Council under Article 11. 221. In no instance involving a threat of war or general peace has the Court dealt with the merits of a case on the basis of law and justice. 222. In certain instances disputes involving threats of war which a party desired to submit to the Court for an opinion have been withheld by the Council. 223. Matters involving peace as submitted under Article 11, establish the rule of precedence for the Conference of Ambassadors. 224. Matters involving peace as submitted under Article 11, establish the rule that the advisory competence of the Court is not in effect limited to the Council or Assembly. 225. The general authorization to deal with threats of rupture between members of the League is granted to the League. 226. No matter in which a rupture between states was threatened has been referred to the Court. 227. A general obligation to submit disputes to arbitration before resort to war has been entered into by members of the League. 228. Four disputes

have been submitted to the Council under Article 15 one of which has been the subject of an advisory opinion by the Court. 229. The general authorization to deal with disputes between members and non-members of the League or between non-members of the League is granted to the League under the Covenant. 230. The general authority granted to the League under the Covenant to settle disputes leaves little opportunity for the Court to apply judicial decision to the prevention of war. 231. The general authorization to the League to prevent war under the Covenant is modified by treaties of security applicable independently of the Covenant. 232. The general authorization to the League to prevent war under the Covenant is modified by regional treaties of security and arbitration negotiated at Locarno which include commissions of conciliation and the Court. 233. The general authorization of the League to prevent war under the Covenant is modified by the Locarno Treaty of Mutual Guarantee. 234. Treaties of mutual security leave little opportunity for the Court to apply judicial decisions. 235. The system established under the Covenant and regional agreements authorizes resort to war to preserve the *status quo*. 236. The European policy of authorized warfare to preserve the *status quo* is not in consonance with the policy of the United States. 237. The authorization of war to settle international disputes as the post-war European policy led to the initiation of an outlawry of war movement in the United States. 238. The practice of war since 1919 in the settlement of international disputes has developed the idea of outlawry of war into a national movement. 239. The principles underlying the movement have been defined. 240. The growth of public opinion in the United States turned the attention of the League in this direction. 241. A coalition agreement has been entered into for the purpose of uniting the peace forces in the United States. 242. The movement to outlaw war is moving forward in three sections. 243. The proposals submitted to the Senate do not increase the powers of the Court to prevent war.

Chapter XVI. Laws to Be Administered by the Court: 244. It must not be possible for the Court to abstain from giving a decision. 245. The parties to a convention may establish the rules which the Court will apply. 246. International custom is recognized as a source of international law. 247. The

general principles of law recognized by civilized nations shall be applied by the Court. 248. Judicial decisions and teachings of the most highly qualified publicists of the various nations are established as a subsidiary means for the determination of rules of law. 249. Article 59 constitutes an exception to the foregoing rule. 250. Article 59 is not applicable to advisory opinions. 251. The Court may decide a case *ex aequo et bono* upon request of the parties. 252. The rule of *ex aequo et bono* does not apply to advisory opinions. 253. The inadequacy of international law constitutes an obstacle to the extension of obligatory jurisdiction. 254. The Peace Treaties disregarded generally accepted rules of international law. 255. The Commission on the League of Nations made no provision in the Covenant for the development and application of international law. 256. The Hague Conference of 1907 made provision for the calling of a Third Hague Conference. 257. For these general reasons the Advisory Committee of Jurists proposed a Resolution for the codification of international law. 258. The League of Nations rejected the recommendation. 259. A plan for the progressive codification of international law was adopted by the Assembly four years later. 260. The co-operation with organizations devoted to the study of international law was authorized by the Assembly. 261. The plan to outlaw war proposes a codification of a different order. 262. The rejection of the proposal to codify law, and the failure of the Statute to provide for its development have given rise to a difference of opinion concerning the adherence of the United States.

Chapter XVII. International Sanctions in Relation to the Court: 263. The Statute makes no provision for sanctions. 264. The general sanctions for the decisions of the Court are in the Covenant. 265. Sanctions for judicial decisions may be devised by the Council. 266. The general rule under Article 13 may be given a wide application through existing treaties. 267. Judgments of the Court may be enforced under the Covenant by economic and military sanctions. 268. These economic and military sanctions are applicable by members of the League. 269. Under what conditions, by whom and when general economic and military sanctions will become applicable has not been determined. 270. The essential

principle of general sanctions under the Covenant is that the enforcement of a judicial decision is conditioned upon non-execution being a violation of the Covenant. 271. Economic and military sanctions are applicable by members of the League under Peace Treaties. 272. Regional agreements for the prevention of war afford sanctions enforceable by the guarantors of the agreement. 273. Economic and military sanctions are applicable to non-members only to the extent of their acceptance of the instrument containing such sanctions. 274. Economic sanctions are applicable by members of the International Labor Organization. 275. Economic and military sanctions are applicable to advisory opinions under certain circumstances. 276. The absence of sequence between the definite legal character of the decisions of the Court and the indefinite political character of sanctions detracts from the judicial character of the entire proceedings. 277. The United States is not amenable to the sanctions contained in the Covenant. 278. No proposal before the Senate contains any reservation concerning sanctions.

Chapter XVIII. Proposals Submitted to the Senate: 279. When the Senate meets on December 7th, it will not have before it any proposal without reservations. 280. The Harding-Hughes plan favors affiliation on five conditions. 281. Mr. Harding's supplemental proposals are but partially before the Senate. 282. President Coolidge has accepted the Harding-Hughes plan without the later recommendations made by Mr. Harding. 283. A separatist proposal was submitted to the Senate by Mr. Lodge. 284. A Republican majority proposal was submitted to the Senate by Mr. Pepper. 285. The Senate has scheduled the opening of the debate on the Court for December 17th. 286. The proposals to separate the Court from the League are not acceptable to members of the League, on grounds of policy. 287. The proposal to separate the Court from the League is impractical upon technical grounds. 288. The proposal to affiliate with the Court under the Harding-Hughes conditions does not adequately protect the interests of the United States. 289. Policies fixed by the Court indicate that affiliation with the Court is for practical purposes affiliation with the League.

Chapter XIX. Interpretation and Extension of Pending Proposals: 290. The general statement that adherence shall not involve any legal relation on the part of the United States to the League of Nations or the assumption of any obligation under the Covenant requires interpretation concerning (1) general obligations; (2) sanctions; (3) withdrawal; (4) Monroe Doctrine; (5) domestic questions. 291. The condition that the United States shall participate in the election of judges calls for a full understanding of the method of participation. 292. The proposal that the United States pay a fair share of the expenses of the Court requires interpretation to assure protection to the interests of the United States. 293. The condition that the Statute shall not be amended without the consent of the United States does not go far enough. 294. A restatement of the policy of the United States on compulsory arbitration will protect the United States with respect to the optional clause in the Statute. 295. The principle of judicial decision as a method of settling international disputes is not specifically advanced in the Harding-Hughes proposal. 296. The development of international law through the jurisprudence of the Court is not specifically furthered in the Harding-Hughes plan. 297. The abolition of war is not recognized in the Harding-Hughes proposal. 298. The adherence of the United States carries with it the moral obligation to submit disputes to the Court. 299. These interpretations and additional proposals for conditions of adherence grant increased protection to the United States against the liability of foreign entanglements. 300. These conditions and understandings may form the basis of a new resolution of adherence.

Chapter XX. Conclusion: To fulfill its pledge to adhere to the Court Statute, the Republican Party should not violate its pledge to assume no obligations under the Covenant. Both are valid promises to the American people. The United States should, therefore, affiliate with the judicial functions of the Permanent Court of International Justice, but not with the political functions of the League of Nations.

CHAPTER I

DESIGN OF THE COURT

1. The Peace Conference at Paris authorized the establishment of the Permanent Court of International Justice: This authority is contained in Article 14 of the Covenant of the League, constituting Part 1 of the Treaty of Versailles.[1] Article 14 of the Covenant empowers the Council of the League of Nations to formulate plans for the establishment of the Court and to submit these plans to the members of the League for adoption. This Article lays down two fundamental principles for the guidance of the Council: (1) The Court shall be competent to hear and determine disputes of an international character which the parties submit to it; and (2) the Court may give an advisory opinion upon any dispute or question referred to it by the Council or Assembly.[2] This legal origin of the Court is to be distinguished from the alleged moral and social origins of the Court which rest upon contra-

[1] The Covenant also constitutes Part I of the Treaties of St. Germain, Neuilly and Trianon, subsequently concluded. The Court is therefore authorized by the series of treaties negotiated by the victorious powers, the Treaty of Lausanne being the only exception.

[2] Text of Article 14 follows:

> The Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice. The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it. The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly.

dictory or insufficient data and are, therefore, rather matters for speculation.

2. The jurisdiction conferred upon the proposed Court by the Peace Treaties was the reason for its immediate organization: The Treaty of Versailles came into force on January 10th, 1920. It contained provisions wherein the "jurisdiction instituted by the League of Nations" is authorized to adjudicate certain disputes.[3] Therefore, it appeared urgent that plans be undertaken for the establishment of the Court. At the second meeting of the Council of the League, in February, 1920, a report was presented by M. Bourgeois (France), proposing that a committee of legal experts be appointed to prepare a draft Scheme for the organization of the Court.[4]

3. The Council appointed an Advisory Committee of Jurists to prepare plans:[5] Its members acted in a private capacity and their recommendations did not necessarily bind their governments. In the communication inviting the mem-

[3] Articles 336, 337 and 386 of the Treaty of Versailles offer illustrations.

[4] In making his report, M. Bourgeois pointed out that in order to give full effect to the stipulations contained in the Treaty and in order to curtail temporary measures which were considered to be necessary, it was essential that consideration be given without delay to the formation of a court.

[5] This Committee, as finally selected, included the following: M. Adatci (Japan), M. Raphael Altamira (Spain), M. Clovis Bevilaqua, replaced by M. Fernandez (Brazil), Baron Descamps (Belgium), M. Francis Hagerup (Norway), M. Albert de Lapradelle (France), Dr. Loder (Netherlands), Lord Phillimore (Great Britain), M. Arturo Ricci-Busatti (Italy), and Mr. Elihu Root (United States). Discussion concerning ratification of the Treaty of Versailles was taking place in the United States Senate at this time; nevertheless, Mr. Root found it possible to accept and was accompanied by Dr. James Brown Scott as legal adviser.

bers to serve, the Secretary-General of the League pointed out that they were to prepare plans for a Court which was to be "a most essential part of the organization of the League of Nations."[6] In accepting this invitation, the Committee assumed the obligation of creating a court in accordance with these instructions. On the occasion of the first meeting of the Committee at the Hague on June 16th, 1920, the solidarity between the League of Nations and the proposed Court was emphasized. M. Bourgeois described the two institutions as complementary to one another.[7] M. de Lapradelle (France), *rapporteur* for the Committee, indicated a similar understanding when he stated: "The new court, being the judicial organ of the League of Nations, can only be created within this League."[8] Mr. Root acted in accordance with these views.[9]

[6] *P. C. of I. J. Doc. Concerning Action of Council,* p. 12.

[7] M. Bourgeois' words follow:

> May I be permitted to say why the Council of the League of Nations consider the two institutions as complementary the one to the other, as of necessity being organized at the same time and as being unable, as long as they wish to preserve their existence, to do without each other? * * *
>
> Finally, there is a last point of view, which we must take in order to envisage the necessary relations between the League of Nations and the International Court of Justice, and the close solidarity which exists and which will always exist to an increasing degree between their two actions. * * * *P. C. I. J. Pub., Proceedings of the Committee,* pp. 9–10.

[8] *Records of the First Assembly, Committees,* Vol. I., p. 420.

[9] On June 18th, 1920, Mr. Root said:

> Now, is it possible that the Council and the Assembly will accept and put into force the plan of the Court if the plan ignores their existence? How are courts constituted originally? However perfect may be the distinction between judicial and political powers, the personnel of the judiciary must necessarily have its origin in the political power.

And, again, on June 22nd, 1920:

> We must first consider that this new court must be provided for as

It is evident that the members of the Committee interpreted their task to be that of completing the system of the League of Nations according to the terms laid down in Article 14 of the Covenant.

4. The recommendations of the Committee were submitted to the Council of the League: The Committee completed its work on July 24th, 1920. Its recommendations comprised a draft Scheme for the creation of a Court and three resolutions. The recommendations were accompanied by a general report. The draft Scheme consisted of sixty-two articles, comprising three parts: (1) Organization; (2) competence; and (3) procedure. The Resolutions provided as follows: (1) For an international conference in continuation of the First and Second Hague Conferences to meet at stated intervals for the advancement of international law. (2) For a High Court of International Justice to be created for the trial of offenses against public order and against the law of nations. (3) For the re-installation of the Academy of International Law at the Hague Peace Palace.[10] The Court proposed in the draft Scheme was authorized to hear and determine only suits between states; it was given compulsory jurisdiction within a limited and specifically defined class of cases; and it was authorized to grant advisory opinions to the Council or the Assembly according to a specified procedure. The draft Scheme was presented on August 3rd, 1920, to the Secretary-General of the League, together with the resolutions and a report of the Secretary-General of the Committee, M. de

a part of the system of which the League of Nations is part. We cannot accept the invitation of the Council and recommend a plan for a court which is not going to form a part of that system. (*Am. J. Int. Law;* January, 1921; pp. 4 and 11.)

[10] These three resolutions were not considered favorably by the First Assembly.

Lapradelle. The Committee could not urge the Council to accept either the draft Scheme or the resolutions without detracting from its own dignity but stated that it held itself in readiness to be of further service. The Secretary-General sent copies of the draft Scheme to members of the League, requesting their suggestions. The replies, together with the draft Scheme, were referred to M. Bourgeois who was requested to make a report to the Council.

5. The Council proposed modifications in the draft Scheme: In his report, M. Bourgeois recommended certain modifications. These modifications limited the matters in which the Court had compulsory jurisdiction to disputes, "the settlement of which is by treaties in force entrusted to it," and they introduced the principle that "the decision of the Court has no binding force except between the parties and in respect of that particular case." [11] These modifications eliminated compulsory jurisdiction, as recommended by the Advisory Committee of Jurists, and made necessary a restricted application of the decisions of the Court, thereby substituting two arbitral features for its judicial character.

6. The Assembly further modified and then adopted the draft Scheme as altered by the Council: The original and modified drafts, together with the reports and suggestions concerning them, were submitted to the First Assembly. The Third Committee of the Assembly, composed of thirty-seven members under the chairmanship of M. Bourgeois, was entrusted with the preparation of a final draft. A sub-committee, composed of five of the jurists who sat as members of the Advisory Committee of Jurists and five representatives of states, was then appointed. It presented a further modified

[11] For original and modified draft Scheme see *Records of the First Assembly, Committees,* Vol. I., pp. 412–495.

draft to the Third Committee which, having made some final modifications, submitted a draft Statute to the plenary Assembly. This draft was adopted unanimously on December 13th, 1920.[12]

7. These changes substantially altered the character and functions of the Court as recommended by the Advisory Committee of Jurists: These modifications extended the jurisdiction of the Court beyond hearing and determining suits between states to include "all cases which the parties refer to it and all matters specially provided for in treaties and conventions in force." They substituted for the compulsory jurisdiction of the first draft an optional clause by which any state, signatory to the Statute, may recognize the jurisdiction of the Court as compulsory, if it so desires; and they eliminated all reference to advisory opinions, thus leaving Article 14 of the Covenant as the sole authorization for the Court to deliver such opinions and without definite rules of procedure.[13]

8. The Statute came into being through a resolution passed by the Assembly providing for a Protocol of Signature: The question of the manner of final acceptance of the Statute appears to have been left to the Third Committee of the Assembly as neither Article 14 of the Covenant nor the draft Scheme contains any provision for its adoption. The unanimous vote of the Assembly establishing the Court would obviously not have made possible the adherence of states mentioned in the Annex to the Covenant but not represented at the

[12] For text of Statute, see Annex II.

[13] The draft Statute, drawn up by the Advisory Committee of Jurists, provided for the election of judges through the Council and Assembly of the League, and also for the financing of the Court through the League. These provisions were not the subject of debate in the Council or Assembly; and were left practically unchanged from the first to the last draft.

First Assembly and thus unable to participate in the vote. This question was solved in the following manner: The Assembly unanimously adopted the draft Statute and in the same resolution authorized the Council to submit the Statute to members of the League "for adoption in the form of a Protocol duly ratified." The Court was to come into existence when the Protocol of Signature was ratified by a majority of the members of the League; and the Protocol of Signature was to remain open for further adherents within the terms specified.[14] The resolution adopted by the Assembly was as indispensable to the creation of the Court as were ratifications by states.

9. Signature to the Protocol is limited to members of the League and to states mentioned in the Annex to the Covenant: The Protocol declares the acceptance of the Statute by members of the League and it provides that the ratification by such members shall be sent to the Secretary-General

[14] The text of the Resolution follows:

1. The Assembly unanimously declares its approval of the draft Statute of the Permanent Court of International Justice—as amended by the Assembly—which was prepared by the Council under Article 14 of the Covenant and submitted to the Assembly for its approval.

2. In view of the special wording of Article 14, the Statute of the Court shall be submitted within the shortest possible time to the members of the League of Nations for adoption in the form of a Protocol duly ratified and declaring their recognition of this Statute. It shall be the duty of the Council to submit the Statute to the members.

3. As soon as this Protocol has been ratified by the majority of the members of the League, the Statute of the Court shall come into force, and the Court shall be called upon to sit in conformity with the said Statute in all disputes between the members or states which have ratified as well as between the other states, to which the Court is open under Article 35, paragraph 2, of the said Statute.

4. The said Protocol shall likewise remain open for signature by the states mentioned in the Annex to the Covenant. (*Records of the First Assembly*, p. 500.)

of the League to be deposited in the archives of the Secretariat.[15] It remains open specifically for the signatures of members of the League and of states mentioned in the Annex to the Covenant of the League.[16] No non-member state, not thus mentioned, may affiliate with the Court; and it is, therefore, erroneous to infer that all nations may affiliate with the Court,

[15] The text of the Protocol of Signature follows:

The members of the League of Nations, through the undersigned, duly authorized, declare their acceptance of the adjoined Statute of the Permanent Court of International Justice, which was approved by a unanimous vote of the Assembly of the League on the 13th December, 1920, at Geneva.

Consequently, they hereby declare that they accept the jurisdiction of the Court in accordance with the terms and subject to the conditions of the above-mentioned Statute.

The present Protocol, which has been drawn up in accordance with the decision taken by the Assembly of the League of Nations on the 13th December, 1920, is subject to ratification. Each Power shall send its ratification to the Secretary-General of the League of Nations; the latter shall take the necessary steps to notify such ratification to the other signatory Powers. The ratification shall be deposited in the archives of the Secretariat of the League of Nations.

The said Protocol shall remain open for signature by the members of the League of Nations and by the states mentioned in the Annex to the Covenant of the League.

The Statute of the Court shall come into force as provided in the above-mentioned decision.

Executed at Geneva, in a single copy, the French and English texts of which shall both be authentic.

December 16th, 1920.

[16] As of January 1st, 1925, the following thirty-six members of the League had ratified this Protocol of Signature: Albania, Australia, Austria, Belgium, Brazil, Bulgaria, Canada, China, Cuba, Czechoslovakia, Denmark, Esthonia, Finland, France, Great Britain, Greece, Haiti, India, Italy, Japan, Latvia, Lithuania, Netherlands, New Zealand, Norway, Poland, Portugal, Roumania, Kingdom of the Serbs, Croats and Slovenes, Siam, South Africa, Spain, Sweden, Switzerland, Uruguay, Venezuela.

for there is no way by which Russia, Germany, Turkey or Mexico may adhere until the Protocol of Signature is amended or until they become members of the League.

10. **This policy of exclusion was abandoned in later instruments:** This draft Treaty of Mutual Assistance, submitted to the Assembly in 1923, would have permitted non-member states to adhere to that treaty, subject to the consent of two-thirds of the signatories with regard to whom it had come into force. The executive resolution of the Fifth Assembly, accompanying the Protocol for the Pacific Settlement of International Disputes, provided that this instrument was to be held open for signature by all states. Both of these instruments, had they been duly ratified, would have enlarged the jurisdiction of the Court.

11. **No provision is made for withdrawal from the Statute:** In the absence of any such provision, a state desiring to withdraw its adherence is confronted with the following difficulties: (1) Members of the League, mentioned in the Annex to the Covenant and signatories to the Statute, do not withdraw from the Court even by withdrawing from the League, since they have derived their right to sign the Protocol of Signature by reason of being mentioned in the Annex to the Covenant and not by virtue of membership in the League. (2) With respect to members of the League signatories to the Statute, which are not mentioned in the Annex to the Covenant,[17] it is a question whether membership in the League constitutes a condition precedent or whether, should they withdraw from the League, their adherence to the Protocol of Signature would become ineffective. (3) With respect to states mentioned in the Annex, but not members of

[17] These states include Austria, Hungary, Bulgaria, Finland, Lithuania, Latvia, Esthonia and Albania.

the League, it would appear that they will have no way of withdrawal except to reserve the right under specified conditions at the time of adherence; or exercise an arbitrary authority of denunciation.[18] Members of the League which have not signed nor ratified the Protocol of Signature may wish to exercise a similar right in the absence of any prohibition against reservations.[19]

12. **Provisions for denunciation have been made in other instruments:** The Treaty of Mutual Assistance provided after a period of fifteen years, denunciation might be made by notification to the Secretary-General of the League. The denunciation of the Protocol for the Pacific Settlement of International Disputes is not provided for as specifically but the Council is empowered to declare the Protocol null and void on grounds to be laid down by the International Conference for the Reduction of Armaments. The Covenant itself provides for withdrawal by members from the League under paragraph 3 of Article 1.[20] The optional clause of the Statute permits of a reservation as to time which is equivalent to the right of denunciation at stated intervals. The existence of such provisions in other treaties raises the question whether the intention was to make adherence perpetual to the Protocol establishing the Court.

[18] Such states are the United States, Ecuador and The Hedjaz.

[19] Such states are: The Argentine Republic, Guatemala, Honduras, Nicaragua and Peru, which have not signed the Protocol of Signature; and Bolivia, Chili, Colombia, Costa Rica, Liberia, Luxemburg, Panama, Paraguay, Persia, Hungary and Salvador, which have signed but not ratified.

[20] Paragraph 3 of Article 1 provides:

> Any Member of the League may, after two years' notice of its intention so to do, withdraw from the League, provided that all its international obligations and all its obligations under this Covenant shall have been fulfilled at the time of its withdrawal.

13. The revision of the Statute is nowhere provided for, leaving the right, by omission, to the Assembly: The Statute contains no provision for its own amendment;[21] and in the absence of any such provision, the rule is that the right of revision remains in the organization which created the instrument. Presumably, therefore, the procedure used for the adoption of the Statute will be followed in its amendment, namely:[22] (1) Submission of the proposed amendment to the Council; (2) recommendations by the Council to the Assembly; (3) reference by the Assembly to a committee; (4) adoption of the report of the committee by resolution of the

[21] M. Bourgeois, on the occasion of presenting the Report of the Third Committee to the Assembly, said:

> It will be for the League to establish the Court and to draft its Statute. But from that moment, and so long as the League of Nations has not by its sovereign power altered those rules, the Court is independent. (*Records of the First Assembly,* p. 437.)

This is confirmed by a further report, adopted by the Council on October 27th, 1920:

> The powers of the Council and of the Assembly are such that they extend to the transformation of the composition of the Court itself, but when they have fully exercised their rights by establishing international jurisdiction under conditions determined by them it is important for them to allow the latter independence in its judgments. (*Records of the First Assembly, Committees,* Vol. I; p. 476.)

[22] The Swiss scheme for a court statute provided in Article 64 for revision to be made either by a majority of a Council of Mediation or by a third of the states or by a group of states representing a third of the populations of states of the League. The proposal for revision was to be notified to all the states. The adoption of an amendment would have required a double majority of states and populations in a conference of states sitting in two successive sessions, taking place at least two years apart. Article 65 provided that a revision of the statute was not to result in the extension of the substantive competence of the Council. (*Doc. Presented to the Committee Relating to Existing Plans for the Establishment of a Permanent Court of International Justice,* p. 276.)

Assembly; and (5) submission by the Council of the resolution to member states for ratification. It is nowhere provided under what conditions an amendment, proposed in this manner, would become effective and whether some signatories might ratify it and be bound by it while other states did not; or whether a ratification would become effective before all signatories had ratified. It is, therefore, apparent that a non-member of the League adhering to the Statute, and desiring to take part in guiding the policy of the Court through amendment of the Statute must do so through the Council and Assembly until the latter has made some other provision. Proposals made in the Fifth Assembly confirm its authority to revise the Statute. That Assembly passed a resolution requesting the First Committee to examine within what limits the terms of Article 36, paragraph 2, of the Statute might be rendered more precise; and the Sixth Assembly considered but deferred to a future session a Danish proposal to attach conciliation commissions to the Court.

14. Revision of the Statute by the Assembly may extend the substantive competence of the League with respect to its members: An illustration is afforded by the Geneva Protocol adopted by the Fifth Assembly. The Protocol provided that the Court should give advisory opinions when requested to do so by a committee on arbitration, appointed by the Council, whenever one party alleged the matter to be of a domestic nature. Should the Court be of the opinion that the question was domestic, the committee on arbitration was bound to accept the opinion and make no recommendation; but this opinion would not preclude the Council from taking the matter under consideration and making a recommendation under Article 11 of the Covenant. At present, the Council may not make a recommendation on domestic questions under the Covenant. This provision, as contained in Articles 4

and 10 of the Protocol would, in effect, have constituted a revision of the Statute, for neither Article 14 of the Covenant nor the Statute requires the Court to grant to the Council an opinion specifically intended for a committee on arbitration; and such revision would, in effect, have extended the power of recommendation by the Council to domestic questions.[23]

15. Revision may be effected by the Assembly through independent acts: The Geneva Protocol, adopted by the Assembly in 1924, demonstrated that such revision might be accomplished in two ways. (1) By interpreting the provisions of the Statute through another instrument as, for instance, the liberalizing of the optional clause through extension of the range of reservations; and (2) by enactment of provisions in new agreements, adopted by the Assembly, which lay new duties upon the Court. Of this nature was the extension of advisory opinions to committees on arbitration appointed by the Council. States, not parties to these interpretative acts or revisory instruments, would not be bound by their terms; but the Court would be bound by the resolutions of the Assembly, when ratified by the requisite number of states, for they would have the same legal status as the present Statute.

16. The Statute contains no provisions for sanctions, leaving the right, by omission, to the Covenant: No reference is made throughout the Statute to the execution of a judgment, whether through good faith or otherwise; except that in an application for revision the Court may require previous compliance before granting the request. Such sanctions as exist for judgments are, therefore, to be found in the Covenant for members of the League or in the Peace Treaties for signa-

[23] See Chapter XIV on Jurisdiction over Domestic Questions for more complete exposition.

tories thereto. Sanctions for advisory opinions rest with the body requesting such opinions, as they form part of its award or decision.

17. **The Court was intended to be and is constituted as the judicial organ of the League of Nations:** This relationship is definitely and legally established in the design of the Court: (1) All three organs of the League originated from the same source. (2) The constitution of the League authorizes the establishment of all three of its branches. (3) The instructions given to the Advisory Committee of Jurists were to the effect that the Court was to complete the organization of the League. (4) The recommendations made by that Committee carried out these instructions. (5) The Statute is derived from Article 14 of the Covenant and defines its general provisions.[24] (6) The Statute was made possible by the legislative act of the Assembly, namely the Protocol of Signature. (7) The submission of this Protocol to states for ratification followed the usual procedure adopted by the League. (8) Signatories to the Protocol are limited to members of the League and to states mentioned in the Annex to the Covenant. (9) The advisory relation of the Court to the League is authorized in Article 14 of the Covenant. (10) Sanctions for opinions and decisions of the Court are vested in the League. (11) Provision is made for the withdrawal of members from the League but not from the Protocol of Signature. (12) Revision of the Statute remains the right of the League. (13) The Statute is, in effect, the judiciary act by which the Court is created and its powers and duties defined; its future policies being left to be developed by the League.

[24] An analogous legislative act occurred in the Protocol for the Pacific Settlement of International Disputes, adopted by the Fifth Assembly. It undertook to define more precisely Articles 15 and 16 of the Covenant under a separate Protocol in much the same manner as the Court Statute defines Article 14.

18. The general policies of the Court are defined by the League of Nations: This control is accomplished: (1) Through exclusion of all non-members of the League, except those mentioned in the Annex to the Covenant of which class of states the United States is the most important; (2) through the absence of any stated grounds for withdrawal; (3) through the reservation of the revision of the Statute to the Assembly; (4) through the exercise of sanctions under the Covenant; and (5) through the advisory relation between Council and Court.

19. The design of the Court makes no adequate provision for the proper functioning of adherent non-members of the League: The Protocol of Signature permits a non-member of the League to adhere, but the Statute does not contain any provisions which permit of its adaptation in conformity with the Protocol of Signature. The design of the Court, as conceived by the Peace Conference at Paris, as interpreted by the Council, as drawn by the Advisory Committee of Jurists, as modified by the Council, as adopted by the Assembly, and as ratified by its members, is part of the fabric and experiment of the League of Nations. Thus, a non-member state may adhere to the Court but it does not appear by what process it may withdraw; the Statute may be amended directly or indirectly but the manner in which a non-member may participate in the future instruments which may affect the Court does not materialize; and the sanctions may be enforced for members of the League, but apparently not for non-members of the League. These inequalities as between member states which have a voice in the control of the general policies of the Court and non-member states which have no such voice, constitute obstacles to be considered before, rather than after, adherence.

20. The proposal for the adherence of the United States stipulating that the Statute shall not be amended without

the consent of this government is inadequate: In view of the foregoing analysis of the design of the Court it would appear that the condition contained in the Harding-Hughes proposal, to the effect that the Statute shall not be amended without the consent of the United States, is inadequate in that it does not extend to independent acts which may interpret or modify the Statute; and in that it makes no provision for exercising a check upon the general policies of the Court as they may be developed by the League of Nations through amendment of Article 14 of the Covenant or through treaties concluded in accordance with Article 36 of the Statute.

CHAPTER II

ORGANIZATION OF THE COURT

21. The Permanent Court of International Justice is organized in addition to the Permanent Court of Arbitration, and parties are at liberty to resort to other tribunals: Article 1 of the Statute establishes the Court primarily for the purpose of exercising the obligatory jurisdiction conferred by the Peace Treaties and the advisory jurisdiction conferred by Article 14 of the Covenant. It was necessary to make resort to the Court optional under Article 1, in accordance with the elimination of the obligatory jurisdiction which had been recommended by the Advisory Committee of Jurists, and in order to leave free members of the League which were parties to agreements providing for arbitration at the Hague, or to enable them to resort to the Council, or to the special tribunals mentioned in Article 13 of the Covenant. The inclusion of the reference to Article 14 of the Covenant in Article 1 of the Statute makes the Court an integral part of the organization of the League.

22. The latitude permitted under Article 1 of the Statute constitutes the Court a co-existing tribunal in an international system: The general system of which the Court is a part comprises: (1) Conciliation and inquiry proceedings, conducted by the Council of the League, to which the Court may be advisory. (2) The Conference of Ambassadors, authorized to deal with boundary questions under the Peace Treaties, to which the Court may be advisory through the Council.

(3) The Reparation Commission, authorized to deal with questions of reparation, in connection with which the Court has jurisdiction in specified instances and to which Commission the Court may propose nominations for arbitrators. (4) Mixed Arbitral Tribunals, authorized to settle economic controversies, to which the Court has no specific relation. (5) Special tribunals for arbitration, created for particular purposes, which may refer legal questions to the Court. (6) The Permanent Court of Arbitration which is free to hear and determine political questions not deemed suitable for submission to the Court; but which matters the Council is also fully authorized to hear and determine. (7) Conciliation commissions provided for in treaties, particularly in the Locarno Treaty of Mutual Guarantee, wherein questions not involving the respective rights of the parties are reserved to a commission of conciliation, and in the Locarno Arbitration Treaties wherein the adjudication of disputes is entrusted to such commissions. The existence and the development of these various kinds of tribunals do not permit of the inference that the Court constitutes the only effective international machinery for the settlement of international disputes.

23. Members of the Court comprise ordinary judges, deputy judges and national judges for special cases: The Court consists of eleven ordinary judges and four deputy judges.[1] The full Court sits, unless other provision is made. It may transact business with less judges, as nine constitute a quorum, or it may have a greater number, for each party is entitled to have a national on the Court when a judgment is rendered. In any case, the decision is taken by a majority vote; and in case of a tie the President or his deputy shall have the casting vote. The term of office is for a period of nine years; and judges shall continue to discharge their duties

[1] For text of Rules of the Court, see Annex III.

until their places are filled; and although replaced they may finish any cases begun during their incumbency. Deputy judges are called upon to sit in the order of a list prepared by the Court with regard to priority of election and secondly of age. The rules adopted by the Court provide that they shall be summoned in rotation unless they are so far distant that a summons will not reach them in time; but such judges shall be called upon, if possible, on the next occasion when the presence of a deputy judge is required. When a deputy judge is summoned to sit as a national judge, the order of rotation, as prescribed in the rules, is not affected thereby. Every member before taking office shall make a solemn declaration in open court that he will exercise his powers impartially and conscientiously.

24. Certain duties are considered to be incompatible with those of a member of the Court: Article 16 of the Statute provides that ordinary members of the Court may not exercise any political or administrative function; but this restriction does not apply to deputy judges except when they are performing their duties in Court. It was the opinion of the Advisory Committee of Jurists that a judge should continue to administer justice in his own country or a professor to give lectures, or a member of Parliament to serve. But members of executive branches of government, while they might be eligible as arbitrators, were not eligible as judges of the Court, especially in view of the fact that vacations would not be sufficiently long, nor would judges possess an independent spirit because of being engaged in active politics. The question is one of incompatibility not disqualification and the person elected may choose which post he will take. International duties, such as representing a state in the League of Nations, are deemed to be incompatible; but not membership in the Permanent Court of Arbitration. Article 24 of the Statute provides that under certain circumstances members of the Court shall not sit. If

a member considers that he should not take part in a decision in a particular case, he so informs the President; and if the President considers that a member should not sit in a particular case, he may give him notice accordingly; and in case of disagreement the Court is to decide the matter.

25. The Court is authorized by the Statute to complete its organization in certain particulars: The Court elects its own president and vice-president for a period of three years.[2] It appoints a registrar whose duties are not deemed to be incompatible with those of the Secretary-General of the Permanent Court of Arbitration.[3] The Court may organize a special chamber to hear labor cases, including particularly those provided for in Part XIII of the Treaty of Versailles; and it may choose assessors to serve therein;[4] also it may organize a special chamber to hear cases concerning transit and communications, particularly those provided for in Part XII of the Treaty of Versailles; and it may choose assessors to serve therein.[5] The members of these chambers are limited to five and are appointed by the Court for a period of three years. The Court may appoint the members of a chamber of summary procedure consisting of three members to serve annually.[6] The meetings of these chambers shall be

[2] The officers elected for the period ending Dec. 31st, 1924, were: President, M. Loder (Netherlands); Vice-President, M. Weiss (France). The present officers are: President, M. Huber (Switzerland); Vice-President, M. Weiss (France). The Registrar is M. Hammarskjöld.

[3] While it may have been the intention of this provision to combine the two offices, such amalgamation has not taken place.

[4] For discussion, see Chapter XII on Jurisdiction with Respect to International Labor.

[5] For discussion, see Chapter XIII, on Jurisdiction with Respect to Transit and Communications.

[6] The following are the members of the Chamber of Summary Procedure for the year 1925: M. Loder, M. Weiss, and M. Huber, members; Lord Finlay and M. Altamira, substitutes.

called by the President whenever the parties request that a case be heard and determined by such chambers. The seat of the Court is established at The Hague and the President and Registrar shall reside there. Sessions are to be held each year, beginning on the 15th of June, and extraordinary sessions may be summoned by the President, whenever necessary. Eight sessions have been held as of October, 1925. Of these, four were extraordinary sessions, namely, the second session called in the matter of the Tunis and Morocco Nationality Decrees; the fourth on the question of Jaworzina; the sixth dealing with the Mavrommatis Jerusalem Concessions and the exchange of Greek and Turkish population; and the seventh session in the matter of the Danzig Postal Service. A fifth extraordinary session has been called to consider the interpretation of the powers of the Council raised in the controversy over Mosul.[7]

26. The expenses of the Court are determined and paid by the League of Nations: The expenses are provided for in a budget approved by the Council which fixes the salary of judges, the allowance for their expenses, the amount of their pensions and the general operating expenses. The Council may not recommend a decrease in the salaries of judges during their term of office. This budget is then submitted to the Assembly for its approval. The Council recommends the ratio of apportionment among members of the League. All members are assessed, irrespective of whether they have adhered or not to the Statute, on the theory that the Court is the judicial organ of the League and as such should be supported by its entire membership. Members include their assessment for the Court in their payments to the League. The amount apportioned for the use of the Court in 1925 was $368,195.30; or about one seventh of the budget of the League, exclusive of the International Labor Office.

[7] For summary of advisory opinions and judgments, see Annex I.

27. The payment of the expenses of the Court by the League entitles the latter to a report on the work of the Court:[8] In accordance with a recommendation of the Fifth Assembly, the Court submits a yearly report on its work, which is distributed to members of the Assembly together with the report on the work of the Council and of the Secretariat.[9]

[8] The *First Yearly Report* was distributed to the Sixth Assembly as Doc. A. 7 (b), 1925.

[9] During discussion of the question Dr. Nansen (Norway) said:

> It would also be very convenient for this Assembly to have a short summary of the activities of the Permanent Court of International Justice. The Assembly has to vote the money for the work of the Court, and it is, therefore, natural that it should wish to see some account of what is being done by that organization. I realise, of course, that the Court is a separate body—that it is absolutely independent of the Council, but I think some method might be found by which the general report could contain just a summary of the decisions taken by the Court and of the judgments given by it. (*Records of the Fifth Assembly,* plenary Meetings, p. 37.)

To this criticism M. Hymans (Belgium), speaking for the Council, replied, pointing out that advisory opinions given to the Council had been reported upon. He added:

> There was surely no occasion for us to refer in the report to the judgments delivered by the Court in its capacity as the Supreme Court in inter-state disputes. Nevertheless, I fully realise the importance which Dr. Nansen attaches to the matter, and I see no reason why the Assembly should not recommend that, in future, the report on the work of the Council should include all information regarding those activities of the Permanent Court of International Justice which are of interest to the Assembly. I would add, however—and my colleague has himself referred to the point—that the Permanent Court is an independent institution and we cannot take upon ourselves to prepare summaries of its work.
>
> Accordingly, if the Assembly approves such a recommendation, the Council will forthwith submit it to the Permanent Court of International Justice, with a request that the Court should prepare a report on its work and the awards which it has given. This would appear to be the best means of settling the question. (*Ibid.,* p. 38.)

While the discussion on this subject in the Fifth Assembly emphasized that the Assembly considered the Court to be an independent body, on the work of which the Council was not authorized to report, the Assembly did not hesitate to request the Court itself to prepare and submit such report. The action goes far toward proving that the Court may be independent in theory but is not so in practice.

28. **Non-members of the League desiring to adhere to the Court Statute and pay a share of the expenses must do so through the League of Nations:** Such participation requires non-member states to co-operate in preparing the budget, in its apportionment, and in payments. The Harding-Hughes proposal covers only the matter of apportionment. The recommendation stipulates that the United States will pay a fair share of the expenses of the Court, as may be determined and appropriated from time to time by the Congress of the United States. This proposal apparently does not entitle this government to a voice in determining the amount of the budget nor in fixing the ratios for other states; nor does it specify the manner in which such payments, as Congress may determine, shall be made. It is a question whether this proposal, wherein the United States may reserve the right to determine its share of expenses at its own discretion, is practicable in relation to other states which may have no way of knowing in advance what position Congress will take. It would seem that a recommendation whereby the United States will participate in making up a budget, at the same time agreeing upon the proportional share which it will carry, would be equally effective as a safeguard and would not embarrass states which are not privileged to determine their own assessment at such time and in such amount as they choose.

29. **The principles of procedure are laid down in the Statute:** (1) The official languages of the Court shall be French

and English. The Court will determine which text is authoritative; but other languages may be used with the authorization of the Court. (2) Cases are brought before the Court by notification of the special agreement under which they are to be submitted, or by written application. The communication must indicate the subject of the dispute and name the contesting parties. (3) All members of the League are notified through the Secretary-General of the League of all matters submitted to the Court. (4) The Court may indicate any provisional measures which it thinks should be taken to preserve the respective rights of either party. Notice of such measures shall be given to the parties and to the Council. (5) Parties may be represented by agents; they may have counsel and the procedure shall consist of written and oral pleadings; the latter consists of hearings by the Court of witnesses, experts, agents and counsel. (6) Hearings are under the control of the President and they are public unless the Court shall decide otherwise or unless the parties demand that the public be not admitted. (7) The Court, at any time, may entrust any individual or bureau, commission, or other organization that it may select, with the task of carrying out an inquiry or giving an expert opinion. (8) Whenever a party fails to appear or to defend its claim, the other party may call upon the Court to decide in favor of its claim. But the Court, before doing so, must satisfy itself that it has jurisdiction in accordance with Articles 36 and 37 of the Statute; and also that the claim is well founded in fact and in law. (9) All questions are decided by a majority vote and, in the event of a tie, the President or his deputy will have the casting vote. (10) Should a state consider that it has an interest of a legal nature, which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene; but if a state uses this right, the construction given by the Court

in a decision will be binding upon it. (11) Unless otherwise decided, each party bears its own costs.

30. The principles governing judgments of the Court are specified in the Statute: The Court takes its judicial decisions in the form of a judgment. (1) The judgment shall state the reason on which it is based and it shall contain the names of the judges who have taken part. It may be taken by a majority vote and judges having a dissenting view are entitled to state their opinion and the reason therefor. The judgment is to be signed by the President and is to be read in open court. (2) The decision of the Court has no binding force except between the parties and in respect of that particular case. (3) The judgment is final and without appeal; but in the event of a dispute as to its meaning and scope the Court shall construe it upon request of the party.[10] (4) The Court may revise its own judgment upon application from one of the parties, based upon the discovery of some fact of such a nature as to be a decisive factor which fact was, when the judgment was given, unknown to the Court and to the party claiming revision, and, provided, the ignorance was not due to negligence. The Court may require compliance with the judgment before granting the application of revision and the application must be made within six months after the discovery of the new fact and cannot be made after the lapse of ten years from the date of the sentence.

31. The Court is authorized to make rules to carry out the foregoing principles:[11] The rules adopted by the Court for hearing and determining cases provide among other things: (1) For the order of precedence of judges, deputy judges and

[10] Such request was submitted by Greece in the case of judgment No. 3; see Annex I.

[11] For Rules of the Court, see Annex III.

national judges. (2) For the selection of national judges when there are several parties in interest and for action in case of failure to notify the Court of a selection within the prescribed time. (3) For the form of oath to be used by judges called upon to complete the Court which form adds "honorably and faithfully" to the terms "impartially and conscientiously" required of ordinary judges. (4) For the dismissal of a member of the Court, the member affected being permitted to make an explanation. (5) For the collection of information necessary to assist the Court in the selection of technical assessors, these assessors to be appointed by a majority vote of the Court or of the Special Chamber, whichever deals with the matter. (6) For the time and manner of election of officers of the Court and for the assignment of their duties. (7) For the creation of the special chambers relating to labor, to transit and to summary procedure. (8) For the selection and definition of duties of the Registrar, and manner of keeping the registry of the Court. (9) For the working of the Court. (10) For contentious procedure. (11) For the institution of proceedings. (12) For interim protection when the Court is not sitting, through recommendations for the preservation, in the meantime, of the rights of parties. (13) For intervention. (14) For summary procedure.

32. The Statute lays down no principles and contains no procedure for advisory jurisdiction: The omission leaves to the Court full discretion to determine what procedure it will follow, generally, or on any given question. The Court has adopted no rules other than that opinions shall be published after deliberation by the full Court; that opinions of dissenting judges may be attached; and as to the form in which questions shall be submitted to the Court. In the twelve matters submitted, the Court has chosen to apply the procedure laid down for judgments in the Statute; but the Court may at any time

and in any case lay down an entirely new procedure, or it may conduct the proceedings informally, or it may alter, in any particular, any existing principle or rule now applicable to judgments. The Court may take such action irrespective of whether the matter is a case involving rights of parties or a theoretical question.

33. **Through its organization the Court is attached to the League:** The following constitute the important features of the attachment: (1) Only members of the League and states mentioned in the Annex to the Covenant may adhere to the Court Statute (Protocol of Signature). (2) The Court is organized in accordance with Article 14 of the Covenant of the League of Nations (Article 1). (3) National groups of states, members of the League, nominate the judges (Article 5). (4) The Assembly and Council elect the judges, fill the vacancies and increase the number of judges (Articles 1–14). Vacancies are certified by the Court to the Secretary-General of the League (Article 18). (5) Not more than one national of a member of the League may serve at the same time as a judge of the Court (Article 10). (6) In the event that the Court elects a judge, the Council prescribes the time for such election (Article 12). (7) Members of the League nominate lists of assessors to be attached to the Court for labor cases (Article 26); and for transit and communication cases (Article 27). (8) Salaries and pensions of judges and the expenses of the Court are fixed by the Council and approved by the Assembly. The amount is apportioned among members of the League and is paid by them, irrespective of their adherence to the Statute (Articles 32–33). (9) Notice of all cases brought before the Court is sent to members of the League through the Secretary-General of the League (Article 40). (10) Notice of provisional measures which the Court recommends be taken to preserve the rights of parties, pending a final settlement, is

transmitted to the Council as well as to the parties for such action as the former may wish to take (Article 41).[12]

34. Proposals for the adherence of the United States to the Statute would either acquiesce in the present organization or would disrupt the scheme: The Harding-Hughes plan lays the burden of adjustment upon the United States without proposing alterations in the Peace Treaties, Covenant or Statute.[13] The Lodge and Pepper proposals seek to separate the Court from the League, thereby fundamentally altering its basic organization and requiring amendment of the Statute if not of the Covenant. No constructive proposal has been made for adherence to the Statute upon conditions which would increase the effectiveness of the Court in the advancement of judicial decisions in the settlement of international controversies.

[12] The Report of the Advisory Committee of Jurists gives as a reason for this provision the following:

> In the present case, these measures are, once they have been suggested by a Court of the League of Nations, indicated to the Council of the League as the body most competent to take such action, in order that it may suggest that the measures calculated to ensure the effect of sentences of Arbitration be carried out. *P. C. I. J. Pub. Proceedings of the Committee,* p. 736.

[13] For text of proposals submitted to the Senate, see Chapter XVIII.

CHAPTER III

NOMINATION OF JUDGES

35. The Court is composed of a body of independent judges elected regardless of their nationality: The judges must be persons of high moral character; they are to possess the qualifications required in their respective countries for appointment to the highest judicial offices; and they are to be jurists of recognized competence in international law.

36. Judges are nominated by members of the League and states mentioned in the Annex to the Covenant: The machinery used for the nomination is the adaptation of the Hague Organization to the purposes of the League. The Hague machinery consists of national groups, not to exceed four persons from each state, who are selected by the states to act as arbitrators under the Hague Convention for the Pacific Settlement of International Disputes. Their duty, as defined by the Convention under which they are appointed, is to act as judges in arbitral tribunals whenever they are requested to do so by parties. The Convention was ratified by states, including the United States, with this purpose in view. The Statute establishing the Court authorizes these national groups to nominate persons to be elected by the League of Nations, subject to the limitation that such groups must belong to members of the League or to states mentioned in the Annex to the Covenant. The significance of including the last named is that they have signed, but not ratified, the Treaty of Versailles, thereby assenting in part to the principles contained in the Treaty, thus

affording a basis of eligibility for participation in nominations. The Statute authorizes members of the League, having no national groups accredited to the Hague Organization, to prepare lists under the conditions prescribed for national groups under Article 44 of the Hague Convention. These national groups do not, however, function as arbitrators; they function merely as nominating bodies within their respective states.

37. The use of the Hague Organization for nominations places it in a subordinate capacity within the League System: The method of using the existing Hague machinery for the purpose of nomination was proposed by Mr. Root to the Advisory Committee of Jurists. Mr. Root stated to the Committee that he had relied upon two fundamental ideas: First, the new Court should form part of a judicial system in which the old Court of Arbitration, still in existence, would also be included; and second, the new Court should also form part of the system of the League of Nations. Concerning the method by which this might be accomplished, Mr. Root thought that "the participation of the members of the Court of Arbitration should be at the beginning and not at the end of the procedure. . . . Otherwise the part played by the Council and the Assembly would be too much reduced; it is only the final decision that really counts."[1] Mr. Root pointed out that these groups were in a better position in the various countries than other persons to take into consideration the questions with which the Court will deal; to know the relative merits of persons to be elected in various countries; to escape suspicion of making a political choice; and to have an international mind.

38. Nominations are set in motion by the League: These two sets of national groups—those accredited to the Hague and those created in its image—do not make nominations

[1] *P. C. I. J. Pub. Proceedings of the Committee,* p. 151.

until requested to do so by the Secretary-General. He invites the groups, through notification to the state department in charge of foreign affairs, to make nominations. These national groups then assemble in their own countries, not as a nominating body at The Hague. They are authorized by the Statute to nominate four persons, only two of whom may be nationals of the state making the nomination. The principle is here established that one state has the right to nominate the national of another state for membership in the Court without the consent or approval of that state. The reason given for this rule was that small states might wish to select nationals from large states. This right was exercised in the nomination of a national of the United States, leading to the subsequent election of Mr. Moore.

39. The procedure for making nominations is not binding on nominators: National groups, in making their selections, are recommended to consult their highest court of justice, legal faculties, schools of law and other bodies devoted to the study of law. They need not do so, and failure to do so does not make the nominations void. When they do consult these various bodies, the recommendations are not binding upon the group, for the obligation to follow them is moral rather than legal. From the names thus submitted, the Secretary-General prepares a list which he submits to the Council and to the Assembly. This is the only list of persons eligible for election, except when a deadlock occurs between Assembly and Council. A Joint Commission may then propose a name not on the regular list.

40. Nominations thus made are not binding upon the electors representing the country of the national group: While governments doubtless exercise an influence over the national groups making the nomination, representatives in the

Council and Assembly are free to vote for any candidate of their choice regardless of nationality.

41. **The machinery for nominations is controlled by the League:** (1) It is the national groups of *arbitrators* and not the Permanent Court of Arbitration which make nominations. (2) It is the national groups of members of the League, and of states mentioned in the Annex which are authorized to make the nominations. (3) Such groups are to make nominations upon the invitation of the Secretary-General of the League. (4) Each group will then meet in its own state. (5) The list of nominations will be forwarded by each group to the Secretary-General. (6) Members of the League, whether or not they are signatory to the Statute, may make such nominations. (7) Conversely, states associated with the Hague Organization but not members of the League nor mentioned in the Annex to the Covenant, may not take part. (8) Finally, therefore, signature to the Covenant and not signature to the Hague Convention of 1907 qualifies a state to participate in nominations.

42. **The League is not dependent upon the Hague Organization:** It does not appear from the foregoing statement that the League of Nations need be dependent upon the Hague Organization for the nomination of judges; for the reason that national groups created in any member state and directly cooperating with the Secretary-General of the League may satisfactorily perform the service of nomination. The adaptation of the Hague machinery is, therefore, a matter of convenience rather than of necessity. This fact is demonstrated by the act of the League in limiting the activities of national groups to members of the League and to states mentioned in the Annex to the Covenant; by creating groups in states not represented at The Hague; and by having each group perform the function of nomination in its own country.

43. The use of the Hague groups for nominations is not authorized by the Hague Convention: (1) The Hague Organization, without the consent of its signatories assembled in convention, is affiliated at least in name with the League of Nations and with the Court. This practice does not appear to be authorized by the Hague Convention. (2) The judicial duties laid upon the arbitrators are augmented by new duties which are political, namely, making nominations for office. The Convention under which these bodies were created does not authorize national groups to perform these duties. (3) These new duties were laid upon the arbitrators by a convention signed by a part of the signatories to the Hague Convention of 1907; and a practice is established whereby the organization and machinery maintained by one group of signatories may be adapted to different ends by another group of signatories.

44. A convention negotiated and ratified for one purpose is used for other purposes not ratified: The United States offers an instance in point. The Senate ratified the Hague Convention of 1907 which created these national groups and defined their duties. That body has hitherto refused to accept the Statute which lays new duties upon these appointees. The national group of the United States appointed under this Convention raised a question when it was invited by the Secretary-General of the League to make nominations. On that occasion the members of the group declined, giving as a reason that under the Hague Convention they were appointed to perform the function contemplated in that Convention, and the invitation to perform functions under another treaty to which the United States was not a party and in respect to which no authority was conferred upon the group, could, therefore, not be accepted. This position was reversed, in 1923, upon the expressed wish of the Secretary of State; and the national group forwarded to the Secretary-General of the League nominations to fill the

vacancy created by the death of Judge Barbosa. The decision of the national group of the United States to participate in the nomination of judges establishes a principle which involves a fundamental right of the Senate. For it is apparent if an instrument negotiated and ratified for one purpose can be made to serve other ends through provisions contained in other instruments which the Senate either has not had the opportunity to ratify or has refused to ratify, the integrity of conventions will be seriously impaired and the right of the Senate will be infringed upon by the executive department.

45. **The proposals for adherence of the United States to the Protocol establishing the Court do not contemplate alterations of the present plan:** The Harding-Hughes proposal is general in character and leaves to the State Department the precise method of participating in the nomination of judges. The action taken by the national group of the United States in nominating a successor to Judge Barbosa indicates that the present method of using the national groups for purposes of nominations has the support of the Administration. The various Senate Resolutions also accept the present method. Nevertheless, a question arises concerning the policy with reference to the Hague and League Organizations and whether the former should remain tributary to the latter through the device of assigning to the Hague Organization through independent conventions duties not provided for in the Convention of 1907. If this precedent for nominations is permitted to stand, the entire character of the Hague Organization is susceptible to alteration without the consent of the signatory states and its prestige may be used to advance causes with which such states may have little in common.

CHAPTER IV

ELECTION OF JUDGES

46. Judges of the Court are elected concurrently by the Assembly and Council: The electors are members of the League, irrespective of whether or not they are signatory to the Court Statute. The Council and Assembly are not electoral colleges; for elections constitute an item of the regular business of the sessions of these bodies.[1]

47. The electors are to bear in mind certain qualifications for judges: According to Article 9 of the Statute the whole body of the Court is to represent the main forms of civilization and the principal legal systems. The Advisory Committee of Jurists had in mind distinct systems of legal education, pointing out that "judges in England and the United States do not act in the same way as judges in other countries; the former attach more importance to precedent, the latter to logical deduction and to the logical sequence of inferences from authorities and principles."[2]

[1] On September 10th, 1923, an election was held to fill a vacancy. The regular agenda of the Assembly for that day included the following items, indicating a regular order of business: (17) Substitute delegates for Cuba and Czechoslovakia, appointment; (18) Budget; (19) Protection of women and children in the Near East; (20) Permanent Court of International Justice: election of a judge in place of M. Ruy Barbosa; (21) Admission of Irish Free State; (22) Earthquake disaster in Japan. (*Records of the Fourth Assembly*, p. 21.)

[2] *Records of the First Assembly, Committees,* Vol. I., p. 434.

48. The method of election is prescribed by the Statute: The list of candidates is submitted to both the Council and the Assembly. These two bodies meet separately but at the same time, and each, by secret ballot, proceeds to nominate eleven judges, by absolute majority vote. The lists nominated by each body are then compared and the judges who have received a majority of all the votes cast in both Assembly and Council are declared elected. The same procedure is followed for the election of deputy judges. In the event of more than one national of the same member of the League being elected, only the eldest shall serve. In the original draft Scheme this qualification attached to all states, but the Assembly apparently anticipating only a League Court, modified Article 10 of the draft Statute. No limitation is placed upon the nationals which a non-member may have and it would seem that such an adherent to the Statute may have more than one national on the Court. In the event that the names receiving the highest vote do not coincide and vacancies remain to be filled, a second and, if necessary, a third meeting takes place. In the event that a vacancy remains after the third meeting of the Assembly and Council, on the request of either, a Joint Conference shall be appointed, consisting of three members each from the two bodies for the purpose of choosing one name for each vacant place to submit to the Council and Assembly. The submission of such name may be by majority vote of the Joint Conference. If the Conference submits a name, other than from the list submitted by the Secretary-General, as it may do under Article 12 of the Statute, then the choice must be made unanimously. If the Joint Conference is satisfied that it will not succeed in procuring an election, the members of the Court already elected shall, within a period to be fixed by the Council, proceed to fill the vacant seats by election from candidates who have already received votes in either the Assembly or Council. This last step is a recognition of the principle of self-perpetuation whereby

existing members of the Court may elect their successors. It furnishes a precedent, if one is required, for the suggestion made by the late President Harding that the Court should elect its own members; for the principle is here clearly established, leaving open to doubt only the number of vacancies which it may fall to the lot of the Court to fill.

49. Vacancies are filled by the method prescribed for elections: Judges continue to discharge their duties until their places are filled. A member of the Court elected to replace a member whose term had not expired holds office for the unexpired term. Replaced judges shall, if possible, finish any cases which they may have begun. These provisions ensure a continuously complete Court and continuity in work.[3]

50. Members of the Court are removable only by their colleagues: Members of the Court, thus elected, serve for a period of nine years.[4] They may be re-elected and are to continue to discharge their duties until their places are filled. They are not removable by the Assembly and Council which elected them and they may not be impeached. A judge may be dismissed only by the unanimous vote of his associates, including

[3] One vacancy has occurred, namely that caused by the death of M. Barbosa (Brazil). This vacancy was filled on September 10th, 1923, on the first ballot by the election of M. Pessoa (Brazil).

[4] On September 14th–16th, 1921, the following were elected as judges and deputy judges:

M. Altamira (Spain), M. Anzilotti (Italy), M. Barbosa (Brazil), M. de Bustamente (Cuba), Lord Finlay (Great Britain), M. Huber (Switzerland), M. Loder (Netherlands), Mr. Moore (United States), M. Nyholm (Denmark), M. Oda (Japan) and M. Weiss (France), judges; M. Beichman (Norway), M. Negulesco (Roumania), M. Wang (China), and M. Yovanovitch (Serb-Croat-Slovene State), deputy judges. The Court was formally opened on February 15th, 1922, at The Hague. Mr. Moore is the only member from a state not a member of the League.

both judges and deputy judges, if in their opinion he has ceased to fulfill the requirements; but the interpretation of the requirements for this purpose is left to the discretion of the other judges. Notification to the Secretary-General of the League makes the place vacant. This provision establishes the principle that the Court, and not the electoral body, is the best judge of the fitness of a judicial officer.

51. **Judges thus elected are the representatives of the League:** The plan for the election of judges appears to have resulted from the joint efforts of Mr. Root and Lord Phillimore, acting upon the suggestion of M. Bourgeois. It represents a compromise from three alternatives—election of judges by the Council alone; exercise of this exclusive privilege by the Assembly; and resort to the Permanent Court of Arbitration. The difficulty which arose at the Hague Conference of 1907, which prevented agreement upon a method of electing judges by reason of conflicting national interests demanding equal representation, was here renewed. It was met by interposing the League of Nations, a political organization, between the states and the judges. Under this plan, judges are not elected as representatives of their states but become the judicial representatives of the League of Nations. In theory, a national judge is disassociated from his state and is thus made responsible to a community of states.

52. **The provision in the Statute whereby judges are elected by the Council and Assembly creates a direct legal relation between the Court and the League and between states which vote therein:** This legal relation may be defined to be the responsibility placed upon the League to elect judges who thus become its representatives; and to be the responsibility placed upon states to perform certain duties as members of the League, irrespective of their adherence to the Statute.

53. **This legal relation creates a practical problem for non-members of the League desiring to adhere only to the Statute:** The Harding-Hughes proposal undertakes to solve this problem. With respect to the election of judges, Mr. Hughes, on February 14th, 1923, recommended that the United States should adhere to the Protocol of Signature establishing the Court upon condition that the United States shall be permitted to participate, through representatives designated for the purpose and upon equality with other states, members respectively of the Council and Assembly of the League of Nations, in any and all proceedings for the election of judges or for filling vacancies. But such adherence and the performance of these acts shall not be taken to involve any legal relation on the part of the United States to the League of Nations or the assumption of any obligation by the United States under the Covenant of the League. This recommendation was referred by the Senate to the Committee on Foreign Relations and commented upon favorably by President Coolidge in his address to Congress on December 6th, 1923. No other action having been taken, Senator King, on December 10th, 1923, introduced a Resolution embodying the Harding-Hughes plan. Beyond making a general declaration and stating that the participation in the election of judges shall be through representatives, the resolution defines no procedure and leaves to the State Department the interpretation of what constitutes commitments. Senator Swanson's Resolution follows the same line.[5]

54. **Other proposals before the Senate would solve the problem of legal relations with the League by separating the Court from the League:** The first of these resolutions was introduced by Senator Lenroot in which he follows the principle of the Harding-Hughes plan, namely that adherence

[5] Senate Resolution No. 32, 68th Congress; First Session, Dec. 10, 1923. See Annex V for text of Swanson Resolution.

shall not be understood to involve any legal relationship on the part of the United States nor signify the assumption of any obligations under the Covenant.[6] But, unlike the foregoing resolution, it undertakes to interpret this principle by providing that all states having diplomatic representatives at The Hague shall be permitted to adhere, which provision would open the Court to universal adherence. It provides, also, that all states shall be divided into two groups to be known as Group A, to include the states of the British Empire, France, the United States, Italy, Japan, Germany and Brazil; and Group B, comprising all other states. If Germany does not adhere then Belgium shall be substituted. These diplomatic representatives are to constitute the electors, and each is to perform electoral duties in the manner now prescribed for the Council and Assembly. The duties now performed by the Secretary-General of the League are to be undertaken by the Registrar of the Court. Senator Lenroot's Resolution does not undertake to separate fully the Court from the League; but only provides for a voting mechanism not affiliated with any political organization. A second resolution was proposed by the late Senator Lodge, then Chairman of the Committee on Foreign Relations.[7] It provides for a complete separation of the Court from the League, retaining the present structure and designating it as a "world court." The plan provides for an electoral commission to consist: (1) Of a general committee composed of the representatives designated for that purpose by the signatory powers and (2) of a special committee to be composed of representatives designated for that purpose by the United States, the British Empire, France, Italy and Japan, together with the representatives of five other signatory Powers to be

[6] Senate Resolution No. 29, 68th Congress; First Session, Dec. 10, 1923.

[7] Senate Resolution No. 122, 68th Congress, First Session, May 8, 1924. For text, see Annex VI.

selected by the General Committee in its discretion by majority vote from time to time. Each signatory Power shall have only one representative on each Committee. This provision is intended to rectify the seven votes of the British Empire in the Assembly. The Electoral Commission is to meet at The Hague or elsewhere if the General Committee so decides. The Electoral Commission is to hold a regular meeting within three months preceding the expiration of the term of office of a member of the Court; and, in case of a vacancy, a meeting is to be held as soon as practicable thereafter. The Electoral Commission is to have a permanent secretary who may be the Secretary-General of the Permanent Court of Arbitration and is to maintain a bureau at The Hague. The Court is to consist of twelve judges and four deputy judges and may be increased by a two-thirds vote of all the members of the special committee to fifteen judges and six deputy judges. The nominations are to be made by the national groups represented at the Permanent Court of Arbitration and states not represented shall make nominations in the same manner. These groups are to be requested to make nominations by the Secretary-General of the Permanent Court of Arbitration and each group may nominate four persons, two of whom may be nationals. The Secretary-General of the Permanent Court of Arbitration is to prepare the list and the two bodies are to meet independently and judges are then to be elected in the same manner as at present by the Council and Assembly, including reference to a Joint Commission and to the Court in the event of a deadlock. This plan substitutes an electoral commission for the League and makes the Secretary-General of the Permanent Court of Arbitration active in the nominations; and it makes possible the participation of all states. In the report accompanying the Resolution it is stated that the purpose is to transform a League Court of Justice to a World Court of Justice without destroying its identity. This Resolution was referred

on March 8th, 1924, to the Committee on Foreign Relations which did not report the measure to the Senate.

55. The plan reported by a majority of the Senate Committee on Foreign Relations proposes a complete separation of the Court from the League: This plan was proposed by Senator Pepper and was referred to the Committee on Foreign Relations, the Republican majority of which submitted the measure, together with a report on May 26th, 1924.[8] It provided that representatives of all the signatories to the Protocol shall meet at such time and place as shall be designated by the Secretary-General of the Permanent Court of Arbitration and proceed to an election. These representatives shall ballot as an electoral assembly. The Principal Allied and Associated Powers, named in the Treaty of Versailles, together with five other signatories to be elected by an Assembly of Signatories, shall ballot in a separate council, and both bodies shall then vote independently; but not more than one vote shall be cast by the British Empire in either body. The Assembly and Council of the Signatories were substituted for the Assembly and Council of the League throughout the provisions. In other respects, the procedure followed that laid down in the present Statute. In the Report accompanying the Resolution, the statement is made that the provision whereby judges are elected by the Assembly and Council of the League of Nations "creates a direct legal relation between the Court and the League, and between the League and any state that votes in its Assembly or Council"; and that the Resolution was drawn to satisfy the essential condition that adherence of the United States should not involve any legal relation. This Resolution, to become effective, would require an amendment of the Statute. "The question," stated the Report, "is whether the amendment shall be such as to prevent a legal relation between the

[8] Senate Resolution No. 234, 68th Congress; First Session, May 20, 1924. For text of Resolution, see Annex VII.

United States and the League or such as to sever for everybody and forever the existing legal relation between the Court and the League." The Resolution takes the view that the latter proceeding is possible and desirable.

56. The proposal of the Republican Administration is embodied in a resolution proposed by a Democratic Senator: The failure of any Republican Senator to introduce a measure embodying the Harding-Hughes proposal left the field open for its introduction through the minority party. On May 6th, 1924, Senator Swanson introduced a resolution embodying this plan;[9] and on March 5th, 1925, he introduced a second Resolution of similar import;[10] but containing an additional reservation concerning advisory opinions.[11]

57. The proposals before the Senate present two extremes: The Harding-Hughes proposal contains certain broad conditions as to principle, leaving a considerable area for interpretation by the Department of State and placing the burden of adjustment upon the United States. It presents the problem whether the determination of what constitutes a legal relation to the League or the assumption of an obligation under the Covenant shall be left to the course of diplomacy or whether it shall be more precisely defined by the Senate. On the other hand, the Lenroot-Lodge-Pepper proposals would separate the Court from the League without taking into sufficient consideration the design of the Court and its serviceability to European states during the period of reconstruction. These plans transfer the burden of adjustment to the League. It would seem, therefore, that a precise interpretation of the general reservations without disturbing the present design of the Court might offer a solution of the problem.

[9] Senate Resolution No. 220, 68th Congress; First Session.

[10] Senate Resolution No. 5, 68th Congress; Second Session.

[11] Senator Willis, a Republican, introduced Resolution No. 6 containing the substance of the Swanson Resolution, on March 5th, 1925.

CHAPTER V

NATIONAL JUDGES

58. It is an accepted principle of law that no one is competent to be a judge in his own case: The fact that a contrary rule has sometimes prevailed in arbitral proceedings has been one of the reasons for lack of confidence in arbitration. At the Hague Conference of 1907, the United States delegation endeavored to have national judges excluded from sitting in matters pertaining to their states. It was the view of Mr. Choate, spokesman for the United States delegation, that "in no case, unless the parties otherwise agree, shall any judge of the Court take part in the consideration or decision of any matter coming before the Court in which his own nation shall be a party."[1] This proposal was, however, defeated.

59. The question before the Advisory Committee of Jurists involved the guarantee of impartiality: The jurists were of the opinion, if it was desired that international law was to be interpreted and developed through the decisions of the Permanent Court of International Justice in a way to command public confidence, that some guarantee must be afforded that the judges sitting in any given controversy should not appear to be sympathetic with either party. The problem was how to substitute a judicial sense of responsibility for the prevailing arbitral practice. The question presented the following aspects: (1) In the event that each party appearing before the Court

[1] *Proceedings of The Hague Peace Conference of 1907*, Vol. II, p. 315.

has a judge on the bench the question arises: (1) Shall the judge refrain from sitting, thereby possibly diminishing too much the number of ordinary judges and involving the risk that the various forms of civilization and the principal legal systems might not be represented? (2) If one of the parties is represented on the Court and the other is not, shall one judge withdraw or another be added? (3) If neither party is represented, is it advisable that each party shall nominate a judge to sit in the case?

60. The difference of opinion manifested at the Hague Conference of 1907 reappeared in 1920: Those in favor of including a national of the party as a member of the Court submitted the following reasons: (1) Very different races, legal systems and civilizations exist; and each party should, therefore, have a judge sitting in the case to interpret and explain matters connected with these characteristics. (2) The presence of such judges would be of assistance in drafting sentences and explanatory statements to remove the possibility of obstacles which national susceptibilities would be inclined to put in the way of their execution. (3) Nations would submit cases with the assurance that the matter would be fully understood. (4) States have an instinctive distrust of a court composed entirely of foreign judges. Those opposed to a national judge sitting in cases affecting the interests of his country objected on the following grounds: (1) The Court is to apply international law and if questions of national law arise, the Court itself is competent to clear up the matter. (2) The inclusion of national judges constitutes an arbitral tribunal not a court of justice. (3) Judges sitting occasionally in a case do not possess the true qualities of a judge. The Committee was of a majority opinion that nationals of each party should sit when the Court heard and determined a case and rendered a decision.

61. The Statute maintains the principle of national judges: (1) Judges of the nationality of each contesting party shall retain their right to sit in the case before the Court. (2) If the Court includes upon the bench a judge of the nationality of one of the parties, the other party may choose a judge, preferably from among the deputy judges or from the candidates nominated by the national groups. (3) If there is no judge of the nationality of the contesting parties on the Court then both may select a judge. (4) If there are several parties in interest they shall choose but one judge.

62. Special provisions apply to national judges chosen ad hoc: (1) Such judges shall meet the same requirements as ordinary judges. (2) They shall take part in the decision on an equal footing. These provisions of the Statute were amplified by the Rules of the Court as follows:[2] (1) National judges chosen from outside of the Court take precedence in order of age after deputy judges. (2) The Court may sit with a number of judges exceeding eleven when one or more parties choose a national judge for that particular case. (3) When there are several parties in interest they are limited to one national judge whom they select by common agreement within a given period but unless the parties notify the Court before the expiration of the time set they shall be regarded as having renounced their right. (4) Each judge summoned to complete the Court makes a solemn declaration to perform his duties as a judge honorably and faithfully, impartially and conscientiously. Only the two last named requirements are provided for in Article 20 of the Statute for ordinary judges.

63. National judges are the representatives of the League and not of the states to which they belong: The interposition of the election machinery of the League makes the

[2] See Articles 2, 4, 5 of the Rules of the Court; Annex III.

members of the Court responsible to that body and not to their states. This constitutes an essential departure from the arbitral method whereby states may select nationals to act as judges and wherein both nationals may then choose a neutral. On the contrary, the nationals of a state need not be nominated by the national group of the state to which they belong. The members of the Court are, therefore, responsible to the League for rendering impartial and conscientious judgments. Any change in the established method of election would have a direct relation to the system of national judges in order to assure the independence of judges against the country from which they come. The precise effect which the interposition of the League may have in separating the judgment of a national judge from the interests of his country in a given case has not been revealed in a manner to permit of a fair deduction either way. In the matter of the first question concerning agricultural labor, M. Weiss, the French national, dissented from the opinion rendered against the contention of France. On the other hand, this same judge voted with the majority in the matter of the Tunis and Morocco Nationality Decrees where the opinion was given in disagreement with the French contention. In the matter of the Mavrommatis Palestine Concessions, Lord Finlay, the British national, together with other judges, rendered a minority opinion in the decision given in favor of the Courts' having jurisdiction to hear the action brought by Greece against Great Britain. On the other hand, M. Anzilotti (Italy) dissented in the Kiel Canal Case, from a judgment rendered in favor of the Allied Powers.[8] It may be noted, however, in the election of a successor to Judge Barbosa whose death caused a vacancy, the political rule was followed, and a Brazilian was elected to succeed a Brazilian. It is conceivable that had the identity of interest between a

[8] For summary of opinions and judgments, see Annex I.

state and its national been subordinated to a community of interest, the choice might have fallen elsewhere.

64. Judges appointed ad hoc furnish an exception in that they represent their states: National judges appointed for a particular case furnish an exception since such judges do not represent any international organization but are selected by their governments. In the case of the S. S. "Wimbledon," M. Schücking, the national judge for Germany, together with other judges, dissented from the majority opinion in favor of the Allied Powers. In the case of the Mavrommatis Palestine Concessions, both decisions of the Court (concerning the Palestine Concessions and the Jerusalem Concession) were in certain aspects unfavorable to Greece, but the Greek national judge, M. Caloyanni delivered no dissenting opinion.

65. Equality of national judges is not maintained in the Chamber of Summary Procedure: The members of this Chamber are limited to three judges, appointed annually by the President of the Court. The parties, in electing to resort to such procedure, may be held to have voluntarily waived the right to have a national judge; but the fact remains that one of the parties may have to make a choice between the emergency presented and the exercise of the right to choose a national judge while the other party may have such a judge in the Chamber. In the matter of the interpretation of the Treaty of Neuilly, the only case heard by this Chamber, neither Bulgaria nor Greece had a national judge.

66. Equality of national judges is maintained in the Special Chambers for labor and for transit and communications: Articles 26 and 27 of the Statute provide, when there is a national of only one party sitting as a judge, one of the ordinary judges will be invited by the President to retire in

order that a national judge of the other party may take his place. In the event, however, that neither party has a national on the Special Chamber, no provision is made for substituting national judges for the ordinary judges.

67. Equality of national judges is not maintained when the Court renders an advisory opinion: The Advisory Committee of Jurists was of the opinion that the Court should deliver an advisory opinion in the same manner as though the case had actually been brought before it; "that is to say a judge of the nationality of each of the contesting parties must be allowed to take his place on the bench, if the parties request it, and the parties must be allowed to present all arguments and proofs just as in a case brought directly before the Court by them."[4] The Court has followed this principle with respect to arguments, proofs, pleadings and appearance of counsel. There exist no rules governing the presence of national judges under advisory procedure; but no party, under the regulations adopted by the Court, has been accorded the right to name a national judge. In the matter of Eastern Carelia, neither Russia nor Finland had a representative on the Court; in the matter of the German Settlers, neither Poland nor Germany had a national on the Court; in the matter of Jaworzina, neither Poland nor Czechoslovakia had a national on the Court; in the matter of the Monastery of Saint Naoum, neither the Serb-Croat-Slovene State nor Albania was represented;[5] in the matter of the exchange of Greek and Turkish populations neither party concerned had a national on the Court; nor did Poland and the Free State of Danzig in the matter of the Danzig Postal Service. In the questions concerning the Iraq Boundary, submitted by the Council for an advisory opinion on September

[4] *Records of the First Assembly, Committees,* Vol. I, p. 451.

[5] The national deputy judge of the Serb-Croat-Slovene State, M. Yovanovitch, did not sit in this case.

17th, 1925, Great Britain will have a national judge but Turkey has no national. Also, Great Britain and France each retained their national judge in the matter of the Tunis and Morocco Nationality Decrees.

68. The principle of national judges as applied to advisory opinions favors the great Powers: Notwithstanding the interposition of League machinery, maintaining the theory that members of the Court are elected by a community of states and are not selected by individual states, the retention of the system of national judges tends to give an advantage to the great Powers. It is a sound inference that the permanent members of the Council of the League will have permanently a national on the Court. Therefore, no case involving these Powers and an ex-enemy state—that is to say, questions arising under the Peace Treaties—can arise in which these Powers have not the advantage against the one national judge of the ex-enemy state. Also, no request for an advisory opinion affecting the interests of the great Powers may be framed by the Council without their consent nor may such opinion be rendered by the Court without the participation of the national judges belonging to these great Powers; whereas opinions affecting the interests of the small Powers may be framed by the Council without their particular consent and the Court may render such opinions without their having any national judge on the Court. It is a practice of unequal representation which could be remedied by an amendment of Rule 71 without alteration of the Statute, thereby recognizing the principle laid down by the Advisory Committee of Jurists.

69. The adherence of the United States should be conditioned upon equal representation under all circumstances: The tendency to submit legal questions concerning actual disputes, thereby involving rights of property, liberty, citizen-

ship and other valuable rights, to the Court for an advisory opinion, almost to the exclusion of judicial decisions, and the inequality of representation in the Chamber of Summary Procedure, raises a pertinent question with respect to adherence by the United States, namely, whether it should not propose, at the time of its adherence as a condition precedent to its signature becoming effective that the Statute should be amended to provide that no dispute or question shall be determined by the Court in advisory proceedings unless the states affected are equal before the Court in the matter of having a national judge on the bench during such proceedings; and that this principle shall apply to proceedings in the Chamber of Summary Procedure.

CHAPTER VI

RIGHT OF ACCESS

70. By accessibility of the Court is meant solely the use of the Court: Access to the Court is to be distinguished from the act of adherence and, also, from membership in the Court which is confined to judges. The Court is accessible to parties in one of two ways: (1) Direct access wherein the states appear as parties in litigious proceedings and request a judgment. (2) Indirect access wherein states desiring advice in litigious matters request the Council to obtain an advisory opinion from the Court.

71. The Court is directly accessible to any state or member of the League: This provision enables the British Dominions which have not attained the status of states, but which are members of the League, to appear as parties. The component parts of the British Empire may, therefore, appear as contestants against each other before the Court. This right would, however, appear to be subject to different interpretations. When the Irish Free State registered the treaty concluded between itself and Great Britain on July 11th, 1924, with the League of Nations, the British Government, in a letter, dated November 27th, 1924, notified the League that it had consistently taken the view that neither the Covenant nor any convention concluded under the auspices of the League is intended to govern relations *inter se* of the various parts of the British Commonwealth. Therefore, it was contended, the treaty did not come within the provisions of Article 18 of the Covenant, which Article states that a treaty is not binding until

registered. Since the Statute is a convention concluded under the auspices of the League, the British view may be found to be opposed to the submission to the Court of disputes arising within the Empire.

72. **The Court is directly and unconditionally accessible to members of the League as a matter of right:** Such members may resort to the Court through requests to the Council for an advisory opinion; through the submission of controversies by agreement; and through the submission of any matter which they embody in a treaty or convention in force.

73. **Right of unconditional direct access may be lost through withdrawal from the League:** Members of the League, not mentioned in the Annex to the Covenant, who withdraw from the League, would lose their right of unconditional access, since such access is conditioned upon membership. Such would be the position of Austria and Hungary; and of Germany or Russia should they join the League and later withdraw. It will be the position of Costa Rica when its request for withdrawal is accepted by the League. But member states, which are mentioned in the Annex to the Covenant, withdrawing from the League, would retain the unconditional right of direct access. Such will be the position of Argentina when the League finally accepts its withdrawal.

74. **Only states may have direct access to the Court as parties:** The Advisory Committee of Jurists was unanimously of the opinion that parties before the Court could not be private individuals, for the following main reasons: (1) Were any parties, other than states, to appear before the Court, national minorities might appeal directly to the Court. The protection of minorities is the right of states and their sovereignty should not

be imperilled by permitting such minorities to go directly before the Court. (2) The duty of a state being to protect its subjects, it followed that a subject having a claim against a state would have the support of his government which would take up the matter on his behalf. (3) The use of the word "international" in Article 14 of the Covenant meant that "the Court could deal with questions affecting private interests but only if the government of the country of which the individual was the subject, made them international by adopting them as its own."[1] (4) The right of private individuals to appear before the Court implied that a conflict between two subjects of the same state might be international if, for example, it dealt with property located in a foreign state, and this was not the interpretation meant by the Covenant. (5) The question of double nationality might arise wherein the individual might desire to have the Court decide of which country he was a citizen. A decision by the Court would raise the question whether a state should amend its domestic law relating to citizenship. To avoid such embarrassment, private individuals should not have access to the Court. This recommendation was in accordance with the Hague Convention of 1907 and was of an arbitral rather than a judicial nature. The Third Committee of the First Assembly sustained this view and rejected the proposal that the International Labor Office should be permitted to appear as a party.[2]

[1] *P. C. of I. J. Pub., Proceedings of the Committee*, p. 207. This view was held by Mr. Root, who also pointed out that the majority of cases before the Court of Arbitration related to private interests, supported by the respective states. Lord Phillimore (Great Britain) based an interpretation of "international," similar to Mr. Root's, upon Articles 18 and 19 of the Covenant, indicating the extent to which the provisions of the Covenant underlie the structure of the Court. Articles 18 and 19 concern the registration and the review of treaties.

[2] See Chapter XII on Jurisdiction with Respect to International Labor.

75. States under a mandate, a protectorate or a guardian appear to have no direct access to the Court: In such circumstances, the control of the foreign relations of the state so placed is vested in the mandatory power or in the guardian and the consent of such mandatory state or guardian is requisite to the submission of any such dispute to the Court. For this reason the self-governing A mandates, Syria, Palestine and Iraq, have access to the Court only through their mandatories. Egypt may not have access to the Court except through the British Government; the Saar Territory would not have access except through the French Government which is in control of its foreign affairs; and the Danzig Free State is similarly conditioned with respect to Poland. It is, therefore, a mistake to assume that the Court is accessible to all states that may desire to appear as parties; for even though the parties might agree to submit their differences to the Court, the consent of the mandatory, guardian or protector would still be necessary.

76. States may have direct access to the Court on behalf of a private person if such person is one over whom the state has the right of protection: This principle was upheld in the matter of the Mavrommatis Palestine Concessions wherein the cause of a Greek citizen against Great Britain was successfully maintained. Whether a state may appear on behalf of persons over whom it has no right of protection, as for instance a minority, would depend upon other procedure, as in the Minority Treaties. In any event, this is a question for the Court to decide whenever its jurisdiction is called into question.

77. The Court is directly accessible to states mentioned in the Annex to the Covenant: The United States belongs to this group and may use the Court as a matter of special privilege. The reasons given for the exceptional position of

the United States were stated by the Advisory Committee of Jurists to be that "owing, to exceptional circumstances, which everyone believes to be only temporary, the United States of America which are mentioned in the Treaty of Versailles among the original members of the League of Nations, have not yet joined the League; they have signed the Covenant, but have not yet ratified it, and are therefore in an exceptional position. Such a situation calls for special treatment; the Court is to be open to them subject only to the condition that the provisions of Article 17 [of the Covenant] are complied with, but in their case this condition will certainly be confined to taking a share in the general expenses of administration."[3] Should it desire to have direct access to the Court, the United States need make no Declaration accepting obligations under the Covenant. It would be required only to contribute to the expenses of the Court in such sum as the Court might determine.

78. States not mentioned in the Annex to the Covenant have direct access to the Court under conditions prescribed by the Council: These regulations require states to make a Declaration accepting the jurisdiction of the Court in accordance with the Covenant.[4]

[3] *P. C. of I. J. Pub. Proceedings of the Committee,* p. 724.

[4] Text of Regulations:

1. The Permanent Court of International Justice shall be open to a State which is not a member of the League of Nations or mentioned in the Annex to the Covenant of the League, upon the following condition, namely: that such State shall previously have deposited with the Registrar of the Court a declaration by which it accepts the jurisdiction of the Court, in accordance with the Covenant of the League of Nations and with the terms and subject to the conditions of the Statute and Rules of Procedure of the Court, and undertakes to carry out in full good faith the decision or decisions of the Court and not to resort to war against a State complying therewith.

79. The Declaration referred to may be particular for a case or general for all disputes: In either case the non-member state agrees to accept the obligations provided for in Articles 12 and 13 of the Covenant, namely, that it will carry out the decision in full good faith and will not resort to war with a state complying therewith. The non-member state, through this agreement, incurs the liability to sanctions con-

2. Such declaration may be either particular or general.

A particular declaration is one accepting the jurisdiction of the Court in respect only of a particular dispute or disputes which have already arisen.

A general declaration is one accepting the jurisdiction generally in respect of all disputes, or of a particular class or classes of disputes which have already arisen or which may arise in the future.

A State, in making such a general declaration, may accept the jurisdiction of the Court as compulsory, *ipso facto,* and without special convention, in conformity with Article 36 of the Statute of the Court; but such acceptance may not, without special convention, be relied upon as regards members of the League of Nations or States mentioned in the Annex to the Covenant which have signed or may hereafter sign the 'optional clause' provided for by the additional protocol of December 16th, 1920.

3. The original declarations made under the terms of this resolution shall be kept in the custody of the Registrar of the Court. Certified true copies thereof shall be transmitted, in accordance with the practice of the Court, to all members of the League of Nations and States mentioned in the Annex to the Covenant, and to such other States as the Court may determine, and to the Secretary-General of the League of Nations.

4. The Council of the League of Nations reserves the right to rescind or amend this resolution by a resolution which shall be communicated to the Court; and on the receipt of such communication by the Registrar of the Court, and to the extent determined by the new resolution, existing declarations shall cease to be effective except in regard to disputes which are already before the Court.

5. All questions as to the validity or the effect of a declaration made under the terms of this resolution shall be decided by the Court. (*Official Journal,* June, 1922, p. 609.)

tained in Article 16 of the Covenant. The original Declaration is deposited with the Court and copies are filed with the League. Questions as to the validity or effect of a Declaration are determined by the Court. No provision is made for the withdrawal of a general Declaration. A minority of the League, namely ten states assembled in the Council, may thus exercise the sole right of determining the conditions under which states, non-members of the League and not mentioned in the Annex to the Covenant, shall use the Court.

80. The Council alone has the right to change the provisions of a Declaration: Any changes are to be transmitted to the Court and they become effective for all future disputes. Changes do not apply to matters already before the Court; and they are subject to two restrictions: they may not place a state in a position of inequality before the Court; and they do not affect the terms of the special provisions contained in treaties in force. All questions as to validity or interpretation of a Declaration are to be decided by the Court.

81. The right of the Council to make regulations is based on the theory of protection of members of the League: The Report of the Advisory Committee of Jurists asserts that the right of the Council "is based both on principles and existing provisions: on principles because it is to the general interest of the peace of the world to extend the development of the international jurisdiction and to enlarge the Court's sphere of action; on existing provisions because Article 17 of the Covenant itself indicates that the methods created by the Covenant for the settlement of disputes may be extended to apply to states which are not members of the League." [5] This theory finds particular expression in the provision relating to the optional clause. Should a non-member state, in making the Declaration, accept the optional clause, any other signatory could

[5] *P. C. of I. J. Pub. Proceedings of the Committee,* p. 725.

summon such non-member before the Court; but the non-member could not summon any other signatory (were it a member of the League) without a special agreement. It is hardly necessary to point out that no non-member state has voluntarily recognized a provision which grants all of the rights to the other party.

82. States may have direct access to the Court by reason of provisions contained in treaties: This right is granted by Article 35 of the Statute and is also specifically provided for in Article 36. Illustrations occur under Parts XII and XIII of the Treaty of Versailles relating respectively to labor and to transit; no conditions may be imposed by the Council, and no obligations under the Covenant are incurred; nor is membership in the League or mention in the Annex to the Covenant essential for access to the Court. Therefore, when Germany was summoned by the Allied Powers under Article 386 of the Treaty of Versailles in the matter of the S. S. "Wimbledon," no other provision was applicable. It appears that any non-member state may thus avoid making a Declaration accepting the Covenant, provided there is an agreement for submission contained in a treaty in force. One non-member state of the League, Germany, has voluntarily and directly resorted to the Court under the terms of a treaty, having requested a judgment under Article 23 of the Germano-Polish Convention concerning Upper Silesia. A preliminary question raised by Poland concerning the competence of the Court, was settled in favor of the Court and the determination of the merits of the case is now pending.[6]

83. Direct access may be had to the Court for the purpose of executing the terms of a treaty: In such instances no conditions attach to resort to the Court other than those con-

[6] For summary of opinions and judgments, see Annex I.

tained in the Treaty in question. Illustrations occur in the matter of the application of the Turkish Government to the Court to nominate counsellors in accordance with the Declaration made by Turkey in the Lausanne Treaty; and in the application to the President of the Court to appoint arbitrators under provisions in treaties conferring such authority.[7]

84. Whether states engaged in a war may have direct access to the Court has not been determined: It has been observed that states engaged in acts of war may, at the same time, be engaged in proceedings before the Council. The capture of the Lithuanian capital of Vilna by Poland furnishes an instance in point. The negotiations before the Council were not broken off by reason of the act of war. Also, that a state of war and of arbitral proceedings may co-exist was demonstrated in the matter of Fiume when Italian irregulars continued their campaign while negotiations for arbitration were proceeding. There appears to be no general rule which prohibits a state from making war and submitting points for settlement to a court at the same time.

85. Indirect access to the Court by parties to a dispute may be had through the Council or Assembly: By virtue of Article 14 of the Covenant these two branches of the League possess the exclusive right to request advisory opinions from the Court. Neither branch may appear as a party but the Secretary-General may appear before the Court for the purpose of giving information. Thus far he has not been requested to appear.

86. Access in non-litigious matters may be had by the Council or Assembly: The scope of Article 14 is sufficiently broad to enable the Council or Assembly to submit to the Court

[7] See Chapter IX on Jurisdiction over Non-Judicial matters.

any questions. Such questions may, accordingly, include legislation pending before the Assembly; also interpretations of the Covenant. Neither the Council nor the Assembly has made use of this right; on the contrary, the tendency is to resort to committees of jurists for the settlement of legal points in connection with legislation or interpretation of the constitution of the League.

87. **Right of access by the Council for purposes of advisory opinions may bring international institutions before the Court as defendants:** The practice of advisory opinions, following the same procedure as that prescribed for judgments of the Court, makes it necessary for organizations or individuals whose acts are called into question to appear as defendants in fact although they may not be technically so regarded. Instances have occurred in the advisory proceedings concerning agricultural labor wherein the International Labor Office was called upon to defend the conduct of its affairs. It is, therefore, possible through the access granted to the Council to call into question the acts of international organizations.

88. **The Court is accessible at all times:** This condition is facilitated by a permanent personnel; by the requirement that the President and Registrar shall reside at the seat of the Court; by the provisions that the President may summon an extraordinary session whenever it seems necessary; and by the fact that the Chamber of Summary Procedure may be called into being whenever the parties desire a speedy settlement of their controversy.

89. **Disputes as to accessibility are decided by the Court:** Article 36 of the Statute provides that "in the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court." Whether this clause applies only to the optional clause (paragraph 2 of Article 36)

or whether it applies also to cases and matters contained in treaties (paragraph 1 of Article 36) is not entirely clear; and it will be for the Court at some future time to determine the precise question. But in view of the liberal construction given by the Court to its competence in the matter of advisory opinions; and in view of its determination to accept the duty to nominate counsellors for Turkey under paragraph 1 of Article 36, it is permissible to assume that the Court will determine by majority vote all questions of who shall use the Court and under what conditions unless it is expressly reserved by the Statute or by the parties in the instrument under which the matter is submitted. The jurisdiction of the Court has been called into question by one of the parties in the following instances: (1) In the matter of Eastern Carelia, Russia, one of the parties, declined to appear and the Court held it had no jurisdiction. This incident establishes the principle that the right of the Council to summon a non-member state may be successfully questioned before the Court. (2) The jurisdiction of the Court was questioned by Great Britain, the defendant party, in the matter of the Mavrommatis Palestine Concessions on the ground that the complaint concerned a private citizen and that diplomatic negotiations between the two countries had not been exhausted. The case arose under the Mandates and under the Concessions Protocol of the Lausanne Treaty. The Court sustained its jurisdiction. (3) The jurisdiction of the Court was questioned in the matter of the German interests in Upper Silesia, wherein Poland opposed the Court's taking jurisdiction on the ground that the matter was governed by Article 256 of the Treaty of Versailles and not by the section of the Germano-Polish convention relating to expropriation; and that the former conferred no jurisdiction upon the Court. The Court has sustained its jurisdiction and has under consideration a determination of the merits of the case.[8]

[8] For summary of opinions and judgments, see Annex I.

90. Proposals for adherence of the United States contain no references to the right of access to the Court: The present position of the United States, with respect to access to the Court, is highly favored. It may resort to the Court solely upon the conditions set forth in the Statute and it incurs no obligations under the Covenant such as attach to members of the League and other non-member states not mentioned in the Annex. No alteration is proposed with respect to the distinctions made between member and non-member states concerning the conditions under which they may have direct access to the Court; and with respect to the right of the Council rather than of the Court, to determine the conditions of its use by non-members. The practice, however, of indirect access to the Court for advice in litigious matters has been referred to in Senator Swanson's Resolution but only for the purpose of making inapplicable to the United States any advisory opinion affecting its interest, in the request for which the United States does not concur. The absence of a more specific policy raises the question whether the United States intends to follow the policy of assigning to the Council the right to be the sole judge in the future as to the manner in which non-members of the League may use the Court or whether it desires to be consulted with respect to any changes to be made in the rules. For, however acceptable the present rules may be, there is at present no control by the majority of signatory states over the rules to be adopted nor can there be until such time as the Assembly may revise the Statute.

CHAPTER VII

OBLIGATORY JURISDICTION UNDER THE STATUTE

91. The jurisdiction of the Court is in principle based upon agreement between the parties: Article 14 of the Covenant fixes this jurisdiction as voluntary. This Article, even in its earliest drafts wherein arbitration was mentioned, did not intend to confer any measure of obligatory jurisdiction upon the Court whereby one party could summon another party before the Court without its consent.[1] The final draft provides that the Court shall be competent "to hear and determine any dispute of an international character which the parties thereto submit to it." This Article definitely fixes the character of the general jurisdiction of the Court to be that of voluntary submission of disputes requiring the consent of both parties.

92. The Advisory Committee of Jurists undertook to broaden the scope of Article 14 to include a measure of obligatory jurisdiction: The Committee proposed that between members of the League the Court should have jurisdiction (without any special convention giving the Court such jurisdiction) to hear and determine cases of a legal nature with respect to: (a) The interpretation of a treaty; (b) any question of international law; (c) the existence of any fact which, if established, would constitute a breach of an international obliga-

[1] The first published draft provided that the Court shall "be competent to hear and determine any matter which the parties recognize as suitable for submission to it for arbitration under the foregoing Article." This draft definitely established the relation of Article 14 to the arbitral proceedings defined in Article 13 of the Covenant.

tion; (d) the nature and extent of reparation to be made for the breach of an international obligation; and (e) the interpretation of a sentence passed by the Court. In the event that a question arose whether a dispute submitted by a party came within any of these categories it was to be settled by the Court.

93. The opposition of the great Powers defeated the liberal interpretation of Article 14: After due consideration of the proposal contained in the draft Scheme, the Council proposed a substitute to the effect that, without prejudice to the right of the parties according to Article 12 of the Covenant to submit disputes between them either to judicial settlement or arbitration or to inquiry by the Council, the Court itself shall have jurisdiction, and this without any special agreement giving it jurisdiction, to hear and determine disputes, the settlement of which is by treaties in force entrusted to the tribunal instituted by the League of Nations. The reasons given for the proposed substitution included the following: (1) The Advisory Committee of Jurists had gone beyond the provisions of Article 14 of the Covenant and the framers of that article never intended that one party to a dispute should compel another party to go before the tribunal.[2] (2) A decision of the Court was being substituted for a decision which the Council should take on the question whether diplomatic methods of settlement had been exhausted. (3) A decision of the Court was being substituted for the free choice allowed to the parties by the Covenant, with regard to the question whether they would lay their dispute before the Court or another tribunal; and the proposal seemed to involve a modification of Articles 12 and 13 of the Covenant which was not then deemed to be desirable.[3]

[2] Note by Lord Balfour; for text, see *Records of the First Assembly, Committees,* Vol. I, p. 511.

[3] Statement by M. Bourgeois, *rapporteur;* for text, see *Records of the First Assembly, Committees,* Vol. I, p. 469.

94. The substitute proposal of the great Powers was opposed by the small states and the result was a compromise on the optional clause: Since unanimity was necessary for the adoption of the draft Scheme by the Assembly and since there was opposition to submitting the Scheme to members of the League without its formal adoption by the Assembly, it was necessary to reach a compromise satisfactory to both great and small Powers if the Court was to become a reality. The compromise reached was that the principle of obligatory jurisdiction should be incorporated in the Statute, but in a form not to be binding upon signatories to the Statute. For this purpose, it was proposed to have two Protocols of Signature—one for the Court and a Special Protocol for obligatory jurisdiction. This special Protocol is annexed to the Protocol of Signature and may be signed by states at the time of their adherence to the Court or at a later date. Signature is, however, entirely optional; hence the name of the clause. The optional clause forms part of Article 36 of the Statute, but is without effect unless signed separately under the Special Protocol, and it is limited in operation among its signatories.

95. Whatever obligatory jurisdiction the Court possesses under the Statute is derived from the optional clause: It provides that members of the League and states mentioned in the Annex to the Covenant may, either when signing or ratifying the Protocol establishing the Court or at a later moment, declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other member or state accepting the same obligation, the jurisdiction of the Court in all or any of the classes of legal disputes concerning; (a) The interpretation of a treaty; (b) any question of international law; (c) the existence of any fact which, if established, would constitute a breach of an international obligation; and (d) the nature and extent of reparation to be made for a breach of an

international obligation.[4] These classifications are identical with Article 13 of the Covenant and with those proposed by the Advisory Committee of Jurists in the draft Scheme except that the interpretation of a sentence by the Court is omitted. Provision for such interpretation is made later under Article 60 of the Statute, which gives the Court authority to construe its own decisions.

96. The Court decides when it has jurisdiction in the foregoing classes of legal disputes: In this respect the optional clause constitutes an advance over arbitral agreements. According to arbitral practice, if a convention establishes arbitration without reservations for certain cases or classes of questions, each of the parties has the right of recourse to the tribunal named. If, however, there are reservations, the parties must reach an agreement as to whether these fall within the terms of the convention. Under the optional clause the Court decides the question.

97. The optional clause extends the operation of the principle of Article 13 of the Covenant to the Court: Under Article 13, members of the League agree that they will submit to arbitration or judicial decision disputes which come within the specified category whenever such disputes cannot be settled by diplomacy. The optional clause repeats these same categories for states which may intend to resort to the Court. The principle established is that the powers of the Court, under the optional clause, are identical with the powers of the Council

[4] The text of the Special Protocol of Signature for the optional clause follows:

> The undersigned, being duly authorized thereto, further declare, on behalf of their Government, that, from this date, they accept as compulsory *ipso facto* and without special convention, the jurisdiction of the Court in conformity with Article 36, paragraph 2, of the Statute of the Court, under the following conditions:

or arbitral tribunals under the Covenant; the Court is not permitted to assume a favored position in the settlement of controversies. In this respect the optional clause is in entire agreement with the view expressed by the Council when rejecting obligatory jurisdiction.

98. **The optional clause may be accepted unconditionally or with reservations:** This rule applies to members of the League and states mentioned in the Annex but not to other non-member states not mentioned in the Annex to the Covenant. The reservations hitherto made concern chiefly reciprocity and time.[5] If a state signs the clause unconditionally, that is, without specifying reciprocity, it may invoke the jurisdiction of the Court only with respect to other signatories, but may, itself, be summoned by any state which has access to the Court.

99. **Rules adopted by the Council for non-member states offer an exception to the rule of reciprocity:** These regulations, drawn up by the Council for the use of the Court by states not members of the League nor mentioned in the Annex to the Covenant, provide that such states, when making a declaration accepting the jurisdiction of the Court, may also accept the optional clause.[6] This, however, does not mean that such states may adhere to the Protocol of Signature; on the contrary, this acceptance gives them no rights of reciprocity whatsoever toward states members of the League or mentioned in the Annex to the Covenant, which may be signatories to the optional clause. Should a non-member state accept the optional clause under this Declaration, any other signatory could request the Court to summon such state; but the non-member state

[5] The right to make such reservations as to time and reciprocity has been used to a great extent; of the twenty-four signatory states twenty-three have made reservations of reciprocity, and of these thirteen have signed for five years, and two for fifteen years.

[6] For text of regulations, see p. 56.

itself would possess no such equivalent right to summon another signatory which is a member of the League, without entering into a special agreement.

100. The optional clause has not been ratified by any great Power: The signatories to the optional clause include the following states, under the conditions named:[7] *Austria:* On condition of reciprocity for a period of five years; expiration on March 14th, 1927. *Belgium:* On condition of reciprocity for a period of fifteen years and whenever the parties have not agreed to resort to other methods of pacific settlement; not yet ratified. *Brazil:* For a period of five years, on condition of reciprocity and when two powers having permanent seats on the Council sign. The signature is not in effect. *Bulgaria:* On condition of reciprocity. *China:* On condition of reciprocity for a period of five years; expiration on May 13th, 1927. *Costa Rica:* On condition of reciprocity. *Denmark:* On condition of reciprocity for a period of five years; expiration on June 13th, 1926. *Dominican Republic:* On condition of reciprocity; not yet ratified. *Esthonia:* On condition of reciprocity for a period of five years, expiration on May 2d, 1928, and whenever the parties have not agreed upon other methods. *Finland:* On condition of reciprocity for a period of five years; expiration on April 6th, 1927. *France:* For a period of fifteen years, on condition of reciprocity; with power of denunciation if the Protocol of Arbitration, Security and Reduction of Armaments lapses; and on condition that one of the parties may bring the dispute before the Council and during such proceedings neither party may proceed against the other before the Court. The Protocol, not having come into effect and the ratification not having been made, the signature is apparently not in

[7] The computations concerning the date of expiration are based on the date of ratification where the signature was subject to such ratification; otherwise on the date of signature.

effect.[8] *Haiti:* Unconditional. *Lalvia:* On condition of reciprocity for five years; expiration on February 12th, 1929. *Liberia:* On condition of reciprocity, not yet ratified. *Lithuania:* On condition of reciprocity, for a period of five years, expiration on May 16th, 1927. *Luxemburg:* On condition of reciprocity for a period of five years, not yet ratified. *Netherlands:* On condition of reciprocity, for a period of five years and whenever the parties have not agreed to resort to other means of friendly settlement; expiration on August 6th, 1926. *Norway:* On condition of reciprocity, for a period of five years; expiration on October 3rd, 1926. *Panama:* On condition of reciprocity. *Portugal:* On condition of reciprocity. *Salvador:* On condition of reciprocity. *Sweden:* On condition of reciprocity for a period of five years; expiration on August 16th, 1926. *Switzerland:* On condition of reciprocity for a period of five years; expiration on July 25th, 1926. *Uruguay:* On condition of reciprocity.

101. The measure of jurisdiction conferred by the optional clause has been negligible: This is due largely to the distribution and character of the signatories. In Europe, the optional clause is operative as between Austria, Bulgaria, Den-

[8] The text of the French reservation follows:

> I hereby declare that, subject to ratification, the French Government gives its adhesion to the optional clause of Article 36, paragraph 2 of the Statute of the Court, on the condition of reciprocity, for a period of fifteen years, with power of denunciation, should the Protocol on Arbitration, Security and Reduction of Armaments signed this day lapse, and, further, subject to the observations made at the First Committee of the Fifth Assembly, according to the terms of which one of the parties to the dispute may bring the said dispute before the Council of the League of Nations for the purpose of the pacific settlement laid down in paragraph 3 of Article 15 of the Covenant, and during such proceedings neither party may take proceedings against the other before the Court. (*Official Journal*, November, 1924, p. 1685.)

mark, Esthonia, Finland, Latvia, Lithuania, Netherlands, Norway, Portugal, Sweden and Switzerland. It is inoperative for Albania, Belgium, the British Empire, Czechoslovakia, France, Greece, Hungary, Italy, Luxemburg, Poland, Roumania, the Serb-Croat-Slovene State and Spain. The following states are not eligible to signature until they join the League: Germany, Russia and Turkey. In North America, the optional clause is not susceptible to operation, there being no signatory. In South America, it is not operative there being but one signature in effect—that of Uruguay. In Central America it may become operative, there being five signatories.[9] It is not susceptible to operation among Asiatic countries, there being but one signatory, China. It is not operative in Africa, there being but one—unratified—signature, that of Liberia. No disputes have been submitted under the optional clause for the general reasons that no alleged war-making state has signed; the condition of reciprocity constitutes a limitation; and the geographic location of the signatories is not such as to lead to disputes between the signatories, with the exception of the Baltic and the Central American groups.

102. The impotence of the optional clause is indicated by the forcible settlement of disputes: Had the members of the League adopted the proposal of the Advisory Committee of Jurists, Lithuania could have summoned Poland before the Court in the matter of Vilna, instead of being denied a judicial hearing, which denial perpetuated a state of war in that region; Albania could have brought the Serb-Croat-Slovene State into Court over the question of the invasion of the Albanian boundaries; the Serb-Croat-Slovene State could have sum-

[9] With the withdrawal of Costa Rica from the League, its adherence to the Court and signature to the optional clause appear to become ineffective, Costa Rica not being mentioned in the Annex to the Covenant. For conditions of withdrawal of states, see p. 10.

moned Italy in the matter of Fiume; Hungary could have summoned Roumania in the matter of the optants in Transylvania; and Great Britain could have obtained an interpretation of the reparation clauses of the Treaty of Versailles, thereby possibly preventing the occupation of the Ruhr. Each of these questions involved an interpretation of a treaty.

103. The optional clause is sufficiently elastic to permit of any reservation which states deem necessary: This view was taken by the Fifth Assembly when it adopted the Geneva Protocol, together with the General Report prepared by M. Politis and M. Bénès. It is in accordance with the terms of Article 13 of the Covenant wherein the states may decide what is generally suitable for arbitration. The Fifth Assembly indicated the extent to which the Statute is intended to conform to the provisions of the Covenant and wherein the powers of the Court are not to exceed those of the Council. The conclusion is embodied in Article 3 of the Protocol;[10] and is expounded in the General Report, which lays down the following principles: The terms of the optional clause are elastic beyond the reservations specified in the text of the Court Statute, namely as to time and reciprocity. Since it is open to states to accept the obligatory jurisdiction of the Court with respect to certain classes of disputes mentioned and not to ac-

[10] Paragraph 1 of Article 3 of the Protocol follows:

The signatory states undertake to recognize as compulsory, *ipso facto,* and without special agreement, the jurisdiction of the Permanent Court of International Justice in the cases covered by paragraph 2 of Article 36 of the Statute of the Court, but without prejudice to the right of any State, when acceding to the special protocol provided for in the said Article and opened for signature on December 16th, 1920, to make reservations compatible with the said clause.

The text of Resolution 2, passed by the Fifth Assembly, interpreted the phrase "reservations compatible with said clause" to mean reservations which states regard as "indispensable."

cept it in respect to other classes of disputes, it makes it possible for them to accept such jurisdiction in respect of a portion only of one of those classes. If the maximum is optional so is the minimum. In giving the undertaking, states are, therefore, free to declare that the optional clause will not be regarded as operative in cases where they consider obligatory jurisdiction to be inadvisable. This interpretation would have definitely removed from the Court its right to decide when it had jurisdiction and what reservations were compatible with the optional clause; and without formal amendment it would have fundamentally affected the application of the Statute. The Protocol indicated that the precise stage at which a dispute may be laid before the Court may be made the subject of a reservation. In the event, for instance, that a state made a reservation to the effect that a question submitted first to the Council should not be submitted to the Court while the Council was exercising jurisdiction, the Court would be deprived of its jurisdiction if one of the parties had appealed first to the Council. The effect of this interpretation would be the following: The Statute contains an optional clause which the signature of a state makes obligatory with respect to other states accepting it. Article 3 of the Geneva Protocol would have made the optional clause obligatory on all states signing such Protocol: but the report accompanying such Protocol would have made acceptance optional through an unlimited range of reservations. The conditions under which the Court could exercise jurisdiction under the Protocol would be determined only after the puzzle of the various reservations had been solved.

104. The elasticity of the optional clause, as interpreted by the Fifth Assembly, is the subject of divided opinion: France, in signing the optional clause with the reservations hereinbefore noted, accepted the interpretation of the Assembly and made a reservation, not provided for under the Statute

but indicated as permissible by the Assembly. On the other hand, no member of the British Empire has accepted the optional clause. A petition, signed by half a million people, urging the British Government to accept the principle of arbitration in all international disputes, and presented on September 4th, 1925, elicited from the Foreign Office a reply to the effect that as to disputes which are likely to lead to rupture, the British Government is already bound under Article 15 of the Covenant to submit all such disputes to arbitration or to the Council. Acceptance of the optional clause would, therefore, have only the effect of sending disputes prescribed in Article 36 of the Statute to the Court instead of the Council. The British Government does not consider it wise to surrender this right of resort by preference to the Council for there may be disputes falling under the classes mentioned in Article 36, of a nature wherein it may be more desirable to have them settled by the procedure of the Council. With respect to disputes not likely to lead to rupture the Government points out that their pacific settlement is being advanced through arbitration treaties and that it would not be wise to agree in advance to submit to arbitration every dispute which may arise, for the "constitution of the British Empire is not unitary, and it is perilous to proceed as if it were." The assent of the Dominions and of India being necessary, it is not possible to give unqualified undertakings which it may prove impracticable to fulfill.[11]

105. Jurisdiction conferred by the optional clause is not stable: This jurisdiction is uncertain because many of the signatures expire in 1926 and 1927. It is not known whether they will be renewed; or whether advantage will be taken by the present signatory states to stipulate new conditions in view of the interpretation set forth in the Geneva Protocol increas-

[11] Reply from Foreign Office to the National Committee for the Prevention of War. (*London Times,* September 26th, 1925.)

ing the range of reservations, following the example of France.[12] The jurisdiction is unstable because the experiment of the Geneva Protocol may be repeated; and the tendency to confer jurisdiction upon the Court through security pacts containing arbitration agreements marks a departure from the inclusion of these obligations within the Covenant and Statute. The difference between the method proposed by the Advisory Committee of Jurists, incorporating obligatory jurisdiction in the enacting Statute and that followed by the League in the optional clause is profound. In the first instance, the jurisdiction applies equally to all signatories; it is not subject to alteration except with the consent of all signatories; it is not properly a matter to be interpreted by a part of the signatories in separate instruments; and it is not subject to reservations which permit of different interpretations by different signatories. Under the optional clause, the jurisdiction is subject to fluctuations in time, in reciprocity, in application as between members of the League and non-member States, in the nature of the reservations and in possible renewals. The computation of the actual amount of jurisdiction conferred upon the Court by the optional clause is, therefore, speculative.

106. The Harding-Hughes proposal does not recommend acceptance of the optional clause: The accompanying memorandum is specific to the effect that acceptance of the optional clause is not recommended. None of the other proposals before the Senate contains any indication that adherence to the Special

[12] Anticipating that renewals might not occur in all cases the Sixth Assembly adopted a resolution, on September 22nd, 1925, requesting the Secretary-General to draw the attention of signatory states to measures to be taken in order to renew their signature. This resolution is somewhat unique in that members of the League which have not accepted the optional clause appear to have voted in favor of urging their co-members to continue a policy which they had refused to accept for themselves.

Protocol would be acceptable to this country. Senator Borah's resolution to outlaw war states that "affirmative jurisdiction" should be conditioned upon the abolition of war and upon the adoption of a code of international law. The attitude toward compulsory arbitration, whereby the right of unilateral summons is conferred upon the Court, is equally definite; as may be seen from the proposal in favor of obligatory arbitration, made by Mr. Choate at the Hague Conference of 1907. The principle was rejected by the Senate in its ratification of the Convention of 1907 wherein it stated that recourse to the Permanent Court of Arbitration could only be had by special or general treaties of arbitration concluded between the parties to a dispute.[13] There is nothing in the record to indicate that the recommendations of the Advisory Committee of Jurists, granting a measure of compulsory jurisdiction to the Court under its own Statute, would have received the endorsement of the Senate of the United States. The record indicates that this Government will not consider any proposal for general compulsory arbitration or for obligatory jurisdiction that is not founded upon a code of international law.

[13] Text of reservation follows:

That the United States approves this Convention with the understanding that recourse to the Permanent Court for the settlement of differences can be had only by agreement thereto through general or special treaties of arbitration heretofore or hereafter concluded between the parties in dispute; and the United States now exercises the option contained in Article 53 of said Convention, to exclude the formulation of the *compromis* by the Permanent Court, and hereby excludes from the competence of the Permanent Court the power to frame the *compromis* required by general or special treaties of arbitration concluded or hereafter to be concluded by the United States, and further expressly declares that the *compromis* required by any treaty of arbitration to which the United States may be a party shall be settled only by agreement between the contracting parties, unless such treaty shall expressly provide otherwise. *The Hague Court Reports,* Scott, p. cvii.

CHAPTER VIII

JURISDICTION UNDER TREATIES

107. Treaties and conventions in force may confer jurisdiction upon the Court: Such jurisdiction is conferred by general or special agreements between the parties to the instrument. The jurisdiction may be obligatory wherein the Court alone is named as the tribunal; or it may be obligatory as to submission but optional as to the choice of tribunal; or it may depend upon the intervention of some agency or state not a party to the dispute. The jurisdiction includes cases but may extend to any matter contained in a treaty in force, for paragraph 1 of Article 36 of the Statute authorizes the Court to take jurisdiction over matters especially provided for in treaties and conventions in force whenever the parties or signatories so request.

108. Obligatory jurisdiction is conferred upon the Court by Part XIII of the Treaty of Versailles, relating to international labor: Article 415 of this Treaty and the corresponding clauses of the Treaties of St. Germain, Trianon and Neuilly provide for an appellate jurisdiction of the Court from the findings of commissions of inquiry concerning the effective observance of conventions which have been adopted by the Labor Conferences and ratified by states; Article 416 provides for primary jurisdiction in case of a member's failing to take action for enactment of legislation recommended by such conventions. Articles 417–420 constitute the only section of the Treaty of Versailles which authorizes the Court to indicate the penalty for violation. This jurisdiction has not been invoked.

Article 423 of the Treaty of Versailles, and the corresponding sections of the Treaties of St. Germain, Trianon and Neuilly provide that any question in dispute, relating to the interpretation of Part XIII, or any subsequent convention concluded in pursuance of its provisions, shall be referred for decision to the Court. The Court has been called upon to make three interpretations of these provisions, but in each case the question was submitted by way of the Council of the League for an advisory opinion.[1]

109. Obligatory jurisdiction is conferred upon the Court by provisions in the Peace Treaties relative to transit; Article 386 of the Versailles Treaty relating to the Kiel Canal confers power exclusively upon "the jurisdiction instituted for the purpose by the League of Nations." Use was made of this jurisdiction by the Principal Allied Powers against Germany in submitting the case of the S. S. "Wimbledon" for a judgment.[2] Articles 327 of the Treaty of St. Germain and 310 of the Treaty of Trianon confer jurisdiction on the Court with regard to the interpretation of these Articles and of the telegraph and telephone conventions to be drawn in accordance with such articles between Czechoslovakia, Austria and Hungary respectively. Article 336 of the Treaty of Versailles and the corresponding clauses of the treaties with Austria, Hungary, Bulgaria, Roumania and Poland, relating to international rivers, made a provisional arrangement under which interested states may appeal "to the tribunal instituted for this purpose by the League of Nations." Under Article 338 of the Versailles Treaty, however, the final provision was laid down by an international convention, approved by the League of Na-

[1] See Chapter XII relating to Jurisdiction with Respect to International Labor.

[2] See Chapter XIII relating to Jurisdiction concerning Transit and Communications.

tions; the jurisdiction conferred hereunder is not obligatory and is discussed elsewhere.[3]

110. **Obligatory jurisdiction is conferred on the Court by international conventions relating to transit:** These include: The Convention for the Regulation of Aerial Navigation (Paris, 1919), providing for the obligatory submission of disputes concerning the interpretation of the Convention; the Convention on the Statute of the Danube (Paris, 1921), conferring obligatory jurisdiction whenever a signatory state submits a matter alleging that a decision of the International Commission violates the Convention; the Convention relating to the Simplification of Customs Formalities (Geneva, 1923), providing for obligatory submission of disputes concerning the interpretation and application of articles relating to the enforcement of customs regulations and the publication of legislation concerning them; and the conventions for the Regulation of Aerial Navigation between Norway and Denmark and Norway and Sweden, providing for resort to the Court in case the parties cannot settle, by direct negotiation, disputes concerning the interpretation and application of the convention.

111. **Obligatory jurisdiction is conferred by mandates drawn up in accordance with Article 22 of the Covenant:**[4] They provide that disputes between the mandatory and a member of the League of Nations, concerning the interpretation or application of the mandate shall be submitted to the Court.

[3] See Chapter XIII.

[4] Paragraph 2 of Article 7 of the Mandate for Nauru, which is reproduced in the other mandates, provides as follows:

> The mandatory agrees that, if any dispute whatever should arise between the mandatory and another member of the League of Nations relating to the interpretation or the application of the provisions of the mandate, such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations.

The Mandate for East Africa, entrusted to Great Britain, contains an additional clause providing that states, members of the League of Nations, may bring before the Court for decision claims on behalf of their nationals. Although this clause is contained in no other mandate, its principle was applied by the Court in the case of the Mavrommatis Palestine Concessions, arising under the Palestine Mandate and submitted by the Greek Government. The Government of Great Britain questioned the competence of the Court on the ground that the party to the dispute was a Greek subject and not the Greek Government. Since the Government of Greece had, however, taken up the matter on behalf of its subject, the Court overruled the British objection and held itself competent to deliver a judgment.[5]

112. Obligatory jurisdiction is conferred by various political conventions drawn up as a result of the Peace Treaties: These conventions may confer jurisdiction:[6] (a) In matters of interpretation, or (b) in matters concerning actual rights of parties. Examples of the first, and less important order, are the following: (1) The Treaty between Great Britain and Iraq, signed at Bagdad in October, 1922; (2) the convention for conciliation and arbitration signed by Latvia, Esthonia, Finland and Poland, at Helsingfors in January, 1925. Of the second order are the following: (1) The Polish-German Agreement with Reference to Upper Silesia, signed at Geneva, May, 1922, (Art. 2) provides that Germany may summon Poland before the Court in matters concerning the terms of new legislation to be introduced by Poland, with the reservation that such matters first must be declared to be suitable for submis-

[5] See Annex VIII for complete list of Mandates.

[6] An instance of obligatory jurisdiction conferred independently of the Peace Treaties is the Convention between Denmark and Norway concerning Eastern Greenland (1924).

sion to the Court by the Upper Silesian Mixed Arbitral Tribunal. Article 23 refers to the Court differences of opinion concerning the expropriation by Poland of German industrial undertakings and rural estates. Under this authorization, Germany has requested a judgment on certain expropriations,[7] Poland has, however, filed a plea questioning the jurisdiction of the Court. (2) The London Agreement of August 30th, 1924, between the Allied Governments and Germany provides that all disputes which may arise between them relating to the arrangement of August 9th, 1924, between the German Government and the Reparation Commission and which cannot be settled by negotiation shall be submitted to the Court. (3) The Inter-Allied Agreement of the same date and relating to the same subject, contains a provision binding the Allied Powers to submit to the Court differences between themselves arising under the agreement. (4) The Treaty of Mutual Guarantee between Germany, Great Britain, France, Italy and Belgium initialled at Locarno, October 16th, 1925, provides that questions concerning the respective rights of parties shall be submitted to judicial decision. (5) The Treaties of Arbitration between Germany and Czechoslovakia, Poland, France and Belgium respectively, provide for obligatory jurisdiction of the Court in the instance that, in a dispute concerning the rights of parties, the Permanent Conciliation Commission, provided for by these treaties, is unable to effect an agreement. If the parties cannot agree on the terms of a special agreement for the submission of the dispute to the Court or to arbitral procedure, under the Hague Conventions of 1907, after one month's notice, either of the parties may bring the dispute before the Court by means of an application.

113. The interpretation of the Peace Treaties in general was not intended to come within the obligatory compe-

[7] See Annex I for judgment; and Annex VIII for list of conventions.

tence of the Court: Notwithstanding the avowed purpose of creating the Court in order to facilitate the application of the terms of the Peace Treaties, the amount of obligatory jurisdiction concerning their interpretation is comparatively unimportant. Matters not entrusted to the Court include the following: The Court is not authorized to interpret the provisions of the Covenant. Later interpretations of the Covenant, namely, the Treaty of Mutual Assistance and the Geneva Protocol entrusted their own interpretation to the Court. Whether by inference these instruments, had they been accepted, would have empowered the Court to have interpreted the Covenant which they expanded, may not be determined. It is, however, the opinion of members of the Council that the interpretation of the Covenant is the right of the Assembly or of the Council, utilizing, if need be, the services of special committees of jurists.[8] The Court is not authorized to interpret the Peace Treaty with respect to questions arising concerning boundaries, that matter having been entrusted to the Principal Allied Powers which exercise the right through the Conference of Ambassadors. The Conference, however, may in its own discretion, request, through the Council, an advisory opinion on any legal point connected with its decisions. The opinions requested in the matters of Jaworzina and Saint Naoum furnish illustrations.[9] The Court is not authorized to interpret questions arising under the articles of the Versailles

[8] Article 10 was interpreted by the Fourth Assembly; Article 11 by the Secretary-General of the League; Article 15 by a Committee of Jurists; Article 16 by the Blockade Commission; Article 18 by a Committee of Jurists; Article 19 by a Committee of Jurists; and Article 21 by the Second Assembly. The Sixth Assembly has adopted a resolution, submitted by the Netherlands delegation, with regard to a further explanation by a Committee appointed by the Council, of the interpretation given to Article 15 by the Special Committee of Jurists.

[9] For summary of opinions and judgments, see Annex I.

Treaty relating to the Saar Basin, the Governing Commission being given authority to decide all questions arising from the interpretation of clauses relating to the cession of territory, the exploitation of mines, and the administration of government. The Court is not authorized to interpret Part X of the Versailles Treaty relating to economic clauses, nor Part VIII relating to reparations, except as hereinbefore noted.

114. **The obligatory jurisdiction conferred by a multiplicity of miscellaneous treaties lacks the stability and uniformity of jurisdiction conferred by the Statute:** The recommendation of the Advisory Committee of Jurists proposed that the Court have jurisdiction over certain classes of legal disputes, thereby granting to the Court a uniform and stable jurisdiction. The members of the League, however, in rejecting this proposal, exercised the undeniable right to grant where they will, in their own discretion, in their agreements with each other, only that amount of jurisdiction which they deem advisable. The result is a multiplicity of agreements which appear to confer upon the Court the right of unilateral summons, but which, in practice, seem to become inoperative. Examples occur in the labor sections of the Treaty of Versailles, wherein the Court is authorized to interpret the provisions of Part XIII, but instead, the Court is found to be engaged in advisory proceedings. Again, under Minority Treaties, it appears that any member of the Council may resort to the Court, but instead the Council requests advisory opinions; and under the transit clauses preliminary intervention tends to separate the parties from the Court. As has been noted, treaties appear to divide their grant of jurisdiction, giving certain rights to the Court or other rights to the Council, or still other rights to arbitral tribunals or conciliation commissions. Illustrations occur in the Upper Silesian Convention, which gives the Court obligatory jurisdiction as regards legislation to be introduced by Poland, and ex-

propriations, but reserves equally important questions concerning the economic welfare of the territory to the Upper Silesian Mixed Commission and to the Arbitral Tribunal. The Guarantee Treaty of Locarno gives the Court jurisdiction over matters concerning the rights of parties and reserves all other matters to commissions of conciliation or to the Council.

115. **Optional jurisdiction is conferred by treaties of conciliation and political agreements:** The object of such treaties being the peaceful settlement of disputes, recourse to the Court appears to be of secondary importance. The agreement concerning arbitration between Austria and Hungary, signed at Budapest, 1923, provides for the settlement of disputes by arbitration, and failing this, for reference to the Court. A series of treaties of conciliation between Switzerland and Austria, Belgium, Brazil, Denmark, France, Hungary, Italy, Japan, Poland and Sweden respectively; and a treaty between Czechoslovakia and Poland, provide for committees of conciliation, and failing these, for submission of the dispute to the Court. The Locarno arbitration conventions concluded by Germany with Czechoslovakia, Poland, France and Belgium respectively, provide that Permanent Conciliation Commissions shall be constituted for the purpose of settlement of disputes concerning the rights of parties. Should these Commissions fail, the parties may submit their disputes to the Permanent Court of International Justice or to an arbitral Tribunal in accordance with the procedure of the Hague Convention of 1907.[10]

116. **Optional jurisdiction is conferred by a small number of commercial treaties:** Such are the Treaty of Commerce and Navigation between Great Britain and Germany, signed at London (1924); also the Commercial Convention between Swit-

[10] Jurisdiction is transferred from the Hague Court to the League Court by agreements renewing the arbitration conventions of Great Britain with Norway and Sweden.

zerland and Poland (1922); and the Treaty of Commerce and Navigation between Esthonia and Finland (1921).

117. Optional jurisdiction is conferred by the Covenant: Amendments now in force to Articles 12 and 13 of the Covenant of the League of Nations make resort to the Court optional in cases of disputes likely to lead to rupture. Article 12 provides that such matters may be submitted "either to arbitration or judicial settlement or to inquiry by the Council"; Article 13 specifies that disputes suitable for submission to arbitration or judicial settlement, if they cannot be settled by diplomacy, will be submitted either to arbitration or judicial settlement; and in the latter case the Court to which the case is referred shall be the Permanent Court of International Justice or any tribunal agreed on by the parties.

118. Optional jurisdiction is conferred by certain political conventions:[11] These conventions, negotiated between two or more countries, provide that the Court shall be one of several means for the settlement of disputes arising under them. Illustrations are the following: (1) The agreement between the Czechoslovak Republic and Austria, signed at Prague (1921), providing that disputes may be submitted to the Court "or to an arbitrator or arbitrators chosen *ad hoc*." (2) The Convention, signed at Warsaw (1922), between Esthonia, Finland, Latvia and Poland, provides that all "more important questions" shall be submitted to arbitration either by arbitrators or by the Court.[12]

119. Optional jurisdiction is conferred by treaties of alliance and security in exceptional instances: These treaties rest upon force in preference to judicial decision. A notable ex-

[11] See Annex VIII for complete list.
[12] This convention was not ratified by Finland.

ception occurs in the Treaty of Alliance and Friendship between France and Czechoslovakia wherein Article 6 provides that the High Contracting Parties agree that controversial questions arising between the signatories, which they cannot settle by friendly agreement and through diplomatic channels, shall be submitted to the Court or to one or several arbitrators chosen by them.[13]

120. Jurisdiction may be conferred upon the Court through intervention by the League in matters of transit and communications: Under Article 376 of the Treaty of Versailles (and the corresponding clauses of the Treaties of St. Germain, Trianon, and Neuilly) disputes concerning the interpretation and application of Part XII (Ports, Waterways and Railways) of the Treaty of Versailles shall be settled "as provided by the League of Nations." Article 338 of the Treaty also lays certain duties upon the League with respect to navigable waterways. The League has, accordingly, drawn up a procedure for the settlement of such disputes by conciliation and, failing this, the matter may be submitted to the Court. The Barcelona Convention and Statute on Freedom of Transit and on the Régime of Navigable Waterways of International Concern, as well as the Geneva Conventions on the International Régime of Railways and the International Régime of Maritime Ports, follow the procedure prescribed by the League of Nations. The conventions on the International Régime of Railways and the International Régime of Maritime Ports specify that during the course of arbitrations parties are bound "in the absence of any contrary provision in the terms of reference" to submit to the Court any questions of law, the solution of which the arbitral tribunal at the request of one of the parties, pronounces to be a necessary preliminary to the settlement of the dispute. Certain clauses of the Peace Treaties fall under the

[13] For discussion of alliances of security, see Chapter XVII on International Sanctions in Relation to the Court.

procedure for the settlement of disputes on transit and communication, as elaborated by the League of Nations. Instances occur in Article 324 of the Treaty of St. Germain, providing that disputes arising under the Conventions between the Czechoslovak and the Austrian Railway Administrations shall be settled under procedure to be laid down by the League; and Article 293 of the Treaty of Trianon which provides that any disputes between the states concerned, respecting the regulations to be drawn up by the Hydraulic System Commission, shall be settled as provided by the League of Nations.

121. Jurisdiction may be conferred upon the Court through intervention by the League in matters relating to minorities: The sections of the Treaties of St. Germain, Trianon, Neuilly and Lausanne, relating to minorities, as well as treaties concluded between the Allied Powers and Poland, Roumania, Czechoslovakia, Greece and the Serb-Croat-Slovene State, known as Minority Treaties, confer upon the Court a unilateral compulsory jurisdiction which is binding only upon the country containing the minorities in question.[14] They provide that disputes as to questions of law or fact concerning such treaties, arising between the country containing the minorities and a member of the Council shall be referred to the Court

[14] Paragraph 3 of Article 12 of the Polish Minority Treaty, which was closely followed in the other Minority Treaties, provides:

> Poland further agrees that any difference of opinion as to questions of law or fact arising out of these articles between the Polish Government and any one of the Principal Allied and Associated Powers or any other Power, a member of the Council of the League of Nations, shall be held to be a dispute of an international character under Article 14 of the Covenant of the League of Nations. The Polish Government hereby consents that any such dispute shall, if the other party thereto demands, be referred to the Permanent Court of International Justice. The decision of the Permanent Court shall be final and shall have the same force and effect as an award under Article 13 of the Covenant.

upon the demand of such member of the Council. Thus a member of the Council is in position to summon Austria, Hungary, Bulgaria, Yugoslavia, Czechoslovakia, Roumania, Greece and Turkey before the Court [15] while these governments have no way of placing their complaint on behalf of their national minorities other than through the Council of the League. The Court has jurisdiction over the merits of a case only when a member of the Council chooses to submit the matter for decision, this act being entirely optional. The procedure adopted by the Council for the examination of minority petitions establishes the practice that members of the Council will not proceed directly to the Court but will act jointly through the Council whenever the jurisdiction of the Court is invoked. The procedure is as follows: The petition of the minority must follow prescriptions which limit it as to kind and content; a petition complying with such prescription is sent to the Secretariat of the League; thence it goes to the state complained against which is given two months or, upon request, a more extended period of time to make its comments; together with the complaint the comments are then submitted to a committee of three members of the Council which decides whether a member of the Council should draw the attention of that body to the petition. If the Committee decides favorably, then the matter is taken up by the Council and there discussed.[16] Only during such discussion may a member of the Council announce its desire to submit the question to the Court. On such occasions the competence of

[15] The Germano-Polish Convention with respect to Upper Silesia provides in Article 72 for the protection of minorities in the same manner as the Polish Minority Treaty. Accordingly, Germany can be summoned to Court in a matter specifically concerning the Polish minorities in Upper Silesia; but not in any matter concerning other minorities.

[16] For provisions see *Official Journal,* November, 1923, p. 1293. Also a recent provision regulating the appointment of the Committee of the Council, *Monthly Summary of the League of Nations,* June, 1925, p. 160.

the Court or that of the Council is usually questioned by the defendant state.[17] The result is that no question arising from Minority Treaties has as yet been submitted to the Court for a judgment by a member of the Council; but two such matters affecting German settlers in Poland have been submitted by the Council for an advisory opinion.

122. Jurisdiction may be conferred through conventions negotiated by the League: An instance occurs in the Convention concerning the Transfer of the Territory of Menel, signed at Paris, May, 1924, which gives unilateral jurisdiction to the Court against the Lithuanian Government, upon request of members of the Council as to differences of opinion arising from questions of law or fact concerning the provisions of the Convention.

123. Direct access to the Court appears to be difficult where jurisdiction may be invoked through intervention of the League: Paragraph 1 of Article 36 of the Statute granting to the Court jurisdiction over matters specially provided for in treaties and conventions in force is intended to afford parties to treaties direct access to the Court. Up to the present time such has not been the result. On the contrary, a policy has been followed whereby the Council has interfered with such direct access by the interposition of its authority between the parties and the Court. This has been accomplished through the creation of technical machinery with respect to transit matters, through the adoption of dilatory procedure in matters relating to minorities, and through reserving to members of the Council the right, in certain instances, to invoke the

[17] Examples are the case of Hungarian optants in Transylvania where such competence was questioned by Roumania; and the cases of the German settlers in Poland and the acquisition of Polish nationality, where the competence was questioned by Poland.

jurisdiction of the Court. A policy is, therefore, established of interposing a procedure prior to submission of a matter to the Court, thereby separating parties from the Court and intercepting judicial decisions.

124. **Jurisdiction conferred upon the Court by treaties to which members of the League are parties may be converted into advisory jurisdiction:** Since the Council may request an opinion upon any case and every subject, it follows that with respect to members of the League it may interfere in the settlement of disputes which one of such parties may desire to submit to the Court through direct access. The Council may exercise this right through suggestion that the parties recognize their obligation under the Covenant and submit the dispute for an advisory opinion rather than a judgment; or the Council may request an opinion upon the request of one of its members without the consent of either or both parties; or the Council may take jurisdiction under Article 15 of the Covenant upon request of one party and establish the claim that negotiations are still in progress as a barrier to the Court's taking jurisdiction; or, finally, the Council may assist in framing treaties which restrict invoking the jurisdiction of the Court to members of the Council. There is no legal obstacle to the conversion of the obligatory and optional jurisdiction into advisory proceedings.

125. **It is possible to exaggerate the increase in judicial settlements which may be represented by the multiplicity of agreements conferring jurisdiction upon the Court:** Apparently the jurisdiction of the Court is immeasurably enlarged by the provisions contained in treaties. Actually, judicial settlement is problematical in view of the steps which may be interposed whenever resort to such jurisdiction is contemplated. The forms of intervention include advisory opinions, prelim-

inary hearings, adjudications before other bodies, or the interposition of agencies between the parties and the Court. In view of the conflicting jurisdiction and the competition from which the Court suffers—namely the Council, the Conference of Ambassadors, mixed tribunals, special arbitral tribunals, commissions on conciliation and other bodies,—the amount of jurisdiction which the Court is permitted by a party to exercise for the purpose of rendering judgments appears to depend upon the good will of other tribunals. This fact is indicated by the disproportion between advisory opinions and judgments, the ratio between the matters submitted being 12 to 4. The record indicates that of the sixteen matters submitted to the Court but two concerned questions arising from instruments not connected with the Peace Treaties. This proportion affords evidence of the degree to which the Court forms a part of the system created by the Treaty of Versailles.

126. The United States has indicated its intention to confer optional jurisdiction upon the Court when the Senate gives its assent to adherence to the Court Statute: Adherence was anticipated at the time the United States renewed, on June 23rd, 1923, its arbitration convention with Great Britain. In an exchange of notes it was agreed that in the event the Senate gives its assent to the proposal for adherence to the Court, a modification of the convention may take place providing for the reference of the disputes mentioned therein to the Permanent Court of International Justice. Similar understandings were reached when arbitration conventions were renewed with France, Norway, the Netherlands and Japan; and also on the occasion of the signature to the Convention between the United States and the Netherlands respecting the Regulation of Liquor Traffic, in August, 1924, at Washington.

CHAPTER IX

JURISDICTION OVER NON-JUDICIAL MATTERS

127. **The Court has jurisdiction over matters other than suits or disputes between states:** Article 36 of the Statute provides that the Court shall have jurisdiction over all cases which the parties refer to it and over all matters especially provided for in treaties and conventions in force. The Advisory Committee of Jurists limited the jurisdiction of the Court to suits between states and to disputes of any kind which may be submitted to it under a general or particular convention between the parties. The Assembly substituted the above provision. The reason for the change is not indicated from the record of discussion, the Third Committee which prepared the revised draft confining itself to the statement that the agreement "may be in the form of a special convention submitting a given case to the Court, or of a Treaty or a general convention embracing a group of matters of a certain nature."[1] Of such an order would be the Peace Treaties and Conventions concluded thereunder, or any future treaty or agreement dealing with matters of interest to special groups of states.

128. **The phrasing of paragraph 1 of Article 36 extends the jurisdiction of the Court to the consideration of non-judicial matters:** There is no definition of what is meant by matters specially provided for in treaties and conventions in force; and there is no limitation placed upon what the clause may be interpreted to include. This interpretation is left solely

[1] *Records of the First Assembly*, p. 463.

to the discretion of the Court, which it may exercise by a majority vote.

129. The Court may advise upon non-judicial matters: The Covenant authorizes the Council to submit any case and every question to the Court. The Statute contains no regulations to guide the Court; and it has adopted no regulations of its own. The determination of what matters the Court will undertake to determine in the future depends largely upon what the Council chooses to submit and upon what a majority of the Court decides to accept.[2] Certain provisions in the Statute facilitate the assumption of non-judicial duties. For instance, Article 50 provides that the Court may at any time entrust any individual, body, bureau, commission or any other organization that it may select with the task of carrying out an inquiry or giving an expert opinion. This authorization does not appear to be limited to a controversy submitted by the parties. There is at present a controversy between the United States and France over the capacity of the latter to pay its war debts. There appears to be no legal obstacle to prevent the Council from submitting to the Court for an opinion the question of the competence of France to pay its debts, provided the request has the assent of France and comes through the Council. Nor is there any legal obstacle to the appointment of a commission of inquiry by the Court for the purpose of determining

[2] The only theoretical interpretation given to this clause appears in a statement by Mr. Moore (U. S. A.): He states that "the phrase 'cases which the parties refer to it' obviously contemplated only disputes between governments, and, unless the phrase 'all matters provided for in treaties and conventions in force' is subject to the same or to a similar limitation, the Court conceivably might be required to act as a board of conciliation, as a mediatorial body, or as an agency for the exercise of good offices. In such event, the Court would, under the last paragraph of the Article, itself determine the question of its jurisdiction." *P. C. of I. J. Doc. D. No. 2*, p. 385.

the facts in the matter. Such action would not require the consent of the United States for the question could be framed in a general manner. There exists a controversy between the United States and Japan over immigration. There appears to be no legal obstacle to the submission of the general question to the Court for an opinion and for inquiry to be made under Article 50. There may arise, in an economic conference or elsewhere, a dispute over the question of tariffs. There appears to be no legal obstacle to the Court's ordering an inquiry into this question pursuant to a request for an advisory opinion. It is immaterial to point out that the United States would not be bound by an opinion rendered by the Court, for its embarrassment in repudiating an opinion rendered by the Court to which it had given its adherence is self-evident; nor would such repudiation necessarily stem resort to propaganda.[3]

130. The Court or its President is authorized to appoint arbitrators: The Peace Treaties provide for Mixed Arbitral Tribunals for the settlement of certain questions arising thereunder; one member is to be appointed by each party and the third, a neutral chairman, is to be appointed by agreement, or failing this, by the Council of the League. This duty appears to have been conferred in later instances upon the President of the Court. An agreement to confer such power is found in a commercial treaty between Latvia and Czechoslovakia, signed in 1922, which provides that a Mixed Arbitral Tribunal shall be constituted *ad hoc* for the settlement of differences and that, failing agreement between the two national representatives, the third arbiter shall be appointed at their request by the President of the Court. The principle, thus established, was followed in the Lausanne Treaty whereunder, failing agree-

[3] It should be noted that these domestic questions may be submitted by other states to the Court for a judgment and a policy may be established thereby which cannot fail to react upon the position taken by the United States with respect to these questions.

ments between the parties, the President of the Court appoints the presidents of the Mixed Arbitral Tribunals to be established between Turkey and the Allied Powers; and an umpire for any arbitral tribunal for the settlement of the compensation payable by Greece to Allied nationals. Under the former provision, the President of the Court has appointed the Presidents of the Greco-Turkish, Roumano-Turkish, Anglo-Turkish and Italo-Turkish Mixed Tribunals. Several duties are conferred upon the President of the Court by the London Agreements. There under, failing agreement between the Reparation Commission and Germany, the President of the Court is to appoint the arbitrator or arbitrators who give the final decision concerning certain differences. Three such instances are mentioned, one of which specifies that the chairman of such arbitral commission is to be a citizen of the United States. In two instances, the President of the Court is authorized to appoint financial experts (in the one instance specifically including a citizen of the United States), should the Transfer Committee (the organization entrusted with their appointment) be unable to reach unanimity. Finally, if the Reparation Commission cannot reach a unanimous agreement upon the appointment of an American citizen who is to take part in its discussion with regard to any point relating to the report of the First Committee of Experts; and if no unanimous agreement can be reached for the appointment of the committee of arbitrators (including a chairman, citizen of the United States) which has the duty to make the final decision concerning any default by Germany, such appointments shall be made by the President of the Court. While these provisions are undoubtedly designed to prevent deadlock and to facilitate settlements, they, nevertheless, bring the Court into a more intimate and responsible relation to the Peace Treaties, not for the purpose of advancing the application of judicial decisions to the settlement of disputes, but for the purpose of promoting concilia-

tion through arbitration. The act of the Court in making nominations thus becomes tributary to arbitral tribunals.

131. **The Court is authorized to make nominations for national offices:** The Declaration made by Turkey, as part of the Lausanne Treaty, provides that the Turkish Government will take into its service legal counsellors whom it will appoint from a list of nominations to be furnished by the Court from countries which did not participate in the war.[4] These coun-

[4] The Declaration reads as follows:

(1) The Turkish Government proposes to take immediately into its service, for such period as it may consider necessary, not being less than five years, a number of European legal counsellors whom it will select from a list prepared by the Permanent Court of International Justice of The Hague from among jurists, nationals of countries which did not take part in the war of 1914–18, and who will be engaged as Turkish officials.

(2) These legal counsellors will serve under the Minister of Justice; some will be posted in the city of Constantinople and others in the city of Smyrna. They will take part in the work of the legislative commissions. It will be their duty to observe, without interfering in the performance by the magistrates of their duties, the working of the Turkish civil, commercial and criminal courts, and to forward to the Minister of Justice such reports as they may consider necessary; they will be authorized to receive all complaints to which the administration of Justice in civil, commercial or criminal matters, the execution of sentences, or the manner of application of the law may give rise, with a view to bringing such complaints to the notice of the Minister of Justice in order to ensure the strict observance of the provisions of Turkish law.

Similarly, they will be authorized to receive such complaints as may be caused by domiciliary visits, perquisitions or arrests; moreover, these measures shall, in the judicial districts of Constantinople and of Smyrna, be brought immediately after their execution, to the notice of the legal counsellor by the local representative of the Minister of Justice; this official shall in such cases be authorized to correspond directly with the legal counsellor. *Declaration Relating to the Administration of Justice in Turkey.*

sellors are to be Turkish officials attached to Turkish courts. Their duty is to observe and report upon the administration of Turkish laws to the Turkish Minister of Justice. They are local officers performing duties within the national domain of Turkey. In accordance with the provisions of the Declaration, Ismet Pasha, on October 26th, 1923, requested the President of the Court to draw up a list of candidates. The Court decided to comply and instructed its President to request the highest legal authorities of Denmark, Spain, Norway, the Netherlands, Sweden and Switzerland each to communicate to the Court the names of two nationals who were qualified to undertake the duties of legal counsellors to the Turkish Government. The list was duly drawn up and forwarded by the President of the Court to the Turkish Government, and the President of the Court has been informed, by the Turkish Minister for Foreign Affairs, that three appointments have been decided upon and a fourth is to follow. It may be argued that the insistence by the Turkish representatives that the capitulatory rights in Turkey be abolished involved the judicial protection of foreigners, and the undertaking to attach counsellors to the Turkish Courts, which were to take over the functions of consular courts, was intended as a juridical safeguard; and, therefore, the Court was performing a necessary act. But political exigencies which imperil the ratification of a treaty, if held to constitute a judicial reason for granting to the Court extra-territorial duties, tend to establish the Court as performing quasi-judicial functions.

132. **The Court has established a precedent in undertaking duties of an extra-territorial nature:** In electing to perform the duty laid upon it by the Lausanne Treaty, the Court has established a precedent which other countries may invoke. For instance, there appears to be no reason why the Powers should not negotiate a treaty with China whereby the Court is

granted similar or additional authority to perform extra-territorial duties. Nor does there seem to be any legal obstruction to its undertaking any duties which affect the domestic affairs of a state, provided only the parties incorporate such duties in a treaty and a majority of the Court are willing to assume them.

133. **Extra-territorial duties performed by the Court may establish a policy at variance with national practice:** The United States is not a signatory to the Lausanne Treaty and has, therefore, not sanctioned the abolition of capitulations which policy has been accepted by other powers. The duty assigned to the Court is conditioned on such abolition. On the other hand, the Powers may agree to extend the extra-territorial duties of the Court with respect to China while the United States may be in favor of their abolition. Should such a situation arise, the United States would not be in a position to make effective protest against the assumption of these duties by the Court for a majority of the Court may take the decision. It may thus happen that the Committee on Foreign Relations in the Senate may favor a policy abolishing extra-territorial privileges while the Court performs duties which maintain these privileges.

134. **The Court, in the exercise of its non-judicial functions, appears to be without adequate authority:** An instance is afforded by the Italo-Greek dispute. This controversy arose in 1923 over the murder of the Italian members of the Commission, appointed by the Conference of Ambassadors for the Delimitation of the Albanian-Greek Frontier. The bombardment of Corfu by Italian warships and its capture, as a guarantee that Greece would meet the Italian demands for reparations, rendered the situation acute:[5] and the Con-

[5] For narrative of dispute, see Kellor and Hatvany: *Security Against War*, p. 198.

ference of Ambassadors undertook the settlement of the dispute. On September 8th, 1923, the Conference announced the terms of settlement which included one to the effect that the Greek Government should undertake to pay the Italian Government an indemnity, the amount of which was to be determined in summary procedure by the Permanent Court of International Justice, to be judged on the strength of a report by a commission of inquiry which the Conference was appointing. The report was to be forwarded to the Court by the Conference, together with its observations. The Greek Government, as a caution, was to deposit in the Swiss National Bank the sum of fifty million lire, the deposit to be effected under the following heading: "To be delivered in whole or in part to the Italian Government upon the decision of the Permanent Court of International Justice at The Hague." The Greek Government accepted these conditions and deposited the sum with the understanding that the Court would decide the question on the basis of the report of the commission of inquiry and would then fix the amount of the indemnity. In accordance with the Greek instructions, the Swiss National Bank was authorized to make payment only upon the decision of the Court.[6] In a note to the Greek Government, dated September 13th, 1923, the Conference specified the manner of compliance and reserved the right to notify Greece of any measures of a coercive or punitive nature to be taken, including, in particular, the payment of a sum of fifty million lire to Italy, in which case the Conference

[6] The Greek instructions follow:

You will receive through the London County and Westminster Bank of London, to the order and for the account of the Greek Government, a deposit of fifty million Italian lire, with instructions that the sum is to be remitted in whole or part to the Italian Government upon the decision of the Permanent Court of The Hague. Please advise the Secretary-General of the League of Nations without delay as to the amount of the deposit and the object for which it is made. (*Official Journal*, Nov., 1923, p. 1304.)

would request the Court to restore to Greece the security deposited by her and no further application would be made to the Court. At this point, the Conference appears to have had in mind relieving the Court of the decision and restoring the deposit which was a right the parties could exercise. On September 26th, however, the Conference rendered its final decision to the effect that Italy should have remitted to her the deposit of fifty million lire and that the Court should be requested to order that such sum be transferred by the Swiss National Bank to the Bank of Rome and placed to the credit of the Italian Government. The Court appears to have had no opportunity for protest against the use made of its prestige to secure the deposit, and the subsequent abandonment of reference to its jurisdiction. In this instance, a powerful group of states, each having a national on the Court, secured a deposit of fifty million lire upon its assurance that the Court would hear and determine the case. With the deposit in hand, they found one of their members would not consent to the procedure and there being no compulsory jurisdiction, the case could not be submitted. When requested to transfer the sum, the Court had two courses open: To restore the deposit to Greece on the ground that the terms upon which the Court had been made custodian had not been complied with; or to transfer the funds, as requested. In choosing the latter course, the Court, at the behest of four members of the Council, acting presumably under Article 36 of the Statute, facilitated a political settlement but without performing any judicial function.

135. Certain principles appear to have been established by these instances: (1) The Court shows an inclination to undertake duties of a non-judicial character. (2) These duties may be laid solely upon the President, as for instance in nominating arbitrators or they may be undertaken by the entire Court. Their assumption does not require the consent of the

other signatories to the Statute and their acceptance is a matter for a minimum of five states to decide. (3) The wide latitude allowed partial groups of signatory States to the Statute in making a treaty to lay new or strange duties upon the Court possesses a latent power to change the policy and practice of the Court without revising the Statute and without consulting a majority of the signatories to the Statute. (4) The Court may, therefore, become the depository for duties of a political, economic or social nature whenever the parties cannot agree upon any other method to secure the application of treaties.[7] (5) The fact that the Court may facilitate the imposition of a penalty without judicial determination of the facts and law involved, indicates the uses which may be made of its good offices in times of supposed crises.

136. The policy of the United States with respect to the non-judicial duties performed by a Court is set forth in its national practice: The tradition established early in the history of the United States, and consistently maintained, is contrary to that followed by the Permanent Court of International Justice. This position was taken early in 1792. By act of Congress of March 23rd, it was provided that Circuit Courts should decide certain claims of invalid pensioners but that their decisions should be subject to revision by the Secretary of War and by Congress. The act, in effect, authorized the Supreme Court judges, sitting in these courts as commissioners, to perform non-judicial duties. On the ground that this act was an encroachment under the division of duties into executive, legislative and judicial branches, the Circuit Court sitting in Pennsylvania declined to proceed with a case and the President

[7] For such an instance, see the suggestion made by Viscount Cecil, that the President of the Court examine technical clauses of defensive treaties for the purpose of exempting them from registration with the League. *Records of the Second Assembly*, p. 845.

was advised by the Chief Justice that the act was considered to be unconstitutional and Congress was so advised.

137. **States adhering to the Court Statute but disassociated from joint political endeavors in Europe appear to lack the protection afforded to members of the League:** It may be assumed that no general treaty and no special treaty, laying duties upon the Court, will be consummated without the assent of one or more of the permanent members of the Council. The functioning of these states in the negotiation of regional security pacts and general security conventions grant to them a practical directing voice as to what duties will be laid upon the Court. It may be assumed, also, that, failing to draw the United States into participation in the affairs of the League or into commitments under these conventions, the tendency will be to concentrate in the Court the performance of duties, to the success of which the adherence of the United States will contribute. For instance, opposition may be raised by the United States to the concentration in the League of the supervision over the regulation of the sale of armaments; but there can be no effective protest against the assumption of the duty by the Court. To the proposal for the appointment by the Council of a military head to direct the application of a joint sanction against a violator of the Covenant the United States may remain indifferent; but what will be its position should the President of the Court be authorized to make such appointment on the ground that the joint military command will be enforcing the opinions or decisions of the Court? Nevertheless, there is no provision which prevents such a contingency; and if it be said that the wisdom of the Court is a sufficient safeguard, there remains the difficulty revealed by the Italo-Greek dispute. In view of the broad provisions of paragraph 1 of Article 36 of the Statute, which apparently permits states to lay any duties they see fit upon the Court, and in the absence of any definite

rule to guide the Court in its determination of acceptance or rejection thereby constituting a safeguard for the Court itself, it seems that there should be an amendment to Article 36, restoring the language proposed by the Advisory Committee of Jurists; or that the United States, in its act of adherence, should state its understanding of Article 36 to be that its provisions will not be held to extend to performance of non-judicial duties, except with the explicit consent of a majority of the signatories to the Court Statute, including the United States.

CHAPTER X

ADVISORY OPINIONS UNDER THE COVENANT

138. The Court possesses advisory jurisdiction: This jurisdiction comprises the authority of the Court to grant advisory opinions to the Council or Assembly upon their request, and is conferred by Article 14 of the Covenant which provides that "the Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly."[1] There is no reference in the Statute to advisory opinions but Article 1 provides that the Court is established in accordance with Article 14 of the Covenant; and Article 36 provides that the Court has jurisdiction over any matter specially provided for in treaties and conventions in force. These clauses are deemed sufficient to authorize the Court to render opinions as specified in Article 14 of the Covenant whenever requested by the Council or by the Assembly.

139. The absence of reference in the Statute is due to action taken by the Assembly: The Advisory Committee of Jurists was of the opinion that Article 14 of the Covenant was mandatory and that the questions referred for an opinion were to be international. Accordingly, an Article was inserted in the draft Scheme to the effect that "the Court shall give an advisory opinion upon any question or dispute of an inter-

[1] The French version of the text uses the verb "will" (*donnera*) in place of "may," raising the question whether the authority conferred upon the Court is mandatory. See Annex I for opinion rendered in the matter of Eastern Carelia; and opinions requested concerning the oecumenical Patriarch and Iraq boundary.

national nature referred to it by the Council or Assembly."[2] The Committee also differentiated between theoretical questions and actual disputes and provided a special procedure when a question did not form the subject of an actual dispute; but opinions were to be given in the same manner as judgments when an actual dispute was involved. The Report of the Committee made it clear that in such a case each party in interest should have a national on the Court. The entire Article was suppressed by the First Assembly on the ground that it was lacking in clearness and likely to give rise to practical difficulties. It was stated that there was no need to maintain the distinction between the two classes of questions and that the draft Scheme entered into details which concerned rules of procedure. For these reasons the Statute remains silent.

140. The origin of this provision appears to have been British: The practice of obtaining advisory opinions from judges, as a precautionary measure against invalid executive or legislative action, had its inception centuries ago in England. The King, as well as the House of Lords, whether acting in a judicial or legislative capacity, had the right to demand the opinion of the twelve judges of England. The practice with respect to the King is not now exercised but the right of the

[2] The text of the proposal, made by the Advisory Committee of Jurists, follows:

> The Court shall give an advisory opinion upon any question or dispute of an international nature referred to it by the Council or Assembly.
>
> When the Court shall give an opinion on a question of an international nature which does not refer to any dispute that may have arisen, it shall appoint a special commission of from three to five members.
>
> When it shall give an opinion upon a question which forms the subject of an existing dispute, it shall do so under the same conditions as if the case had been actually submitted to it for decision. (Article 36 of draft Scheme.)

House of Lords to put abstract questions of law to the judges, the answer to which may be necessary to it in its legislative capacity, still prevails.[3] The clause concerning advisory opinions did not appear in the first published draft of the Covenant but the recommendation formed part of the British draft for a Covenant presented by Viscount Cecil to the Commission on the League of Nations.[4] When the final draft of the Covenant was submitted to the Peace Conference at Paris, the customary British practice of advisory opinions was incorporated and enlarged.

141. The practice followed by the Council under Article 14 is a departure from the English rule: While there have been certain departures from the rule, namely under the Stuart Kings, wherein opinions were requested from the judges upon matters about to come before them for judgment, the general practice has been to request such opinions upon legislative matters and abstract questions of law. The practice followed by the Council is quite the contrary. When important matters of legislation, such as the Treaty of Mutual Assistance and the Geneva Protocol, have been before the Assembly, consultative services were rendered by committees of jurists. When the Council has been formulating important conventions, the Court's opinion upon legal or constitutional questions has

[3] See Chapter XI on Advisory Opinions in the United States.

[4] Article 7 of the British draft of the Covenant provided:

Where the Conference or the Council finds that the dispute can with advantage be submitted to a court of international law, or that any particular question involved in the dispute can with advantage be referred to a court of international law, it may submit the dispute or the particular question accordingly, and may formulate the questions for decision, and may give such directions as to procedure as it may think desirable. In such case, the decision of the Court shall have no force or effect unless it is confirmed by the report of the Conference or Council. (*Woodrow Wilson and World Settlement*, by Ray Stannard Baker, Vol. III, p. 137.

not been ascertained. When the question of interpreting the Covenant arose in the Italo-Greek dispute, members of the Council stated that the interpretation of constitutional questions was not within the province of the Court but was rather a matter for the Council or Assembly to decide. The rule followed by the Council, therefore, differs from the English rule in that advisory opinions are not used for legislative matters or abstract questions of law.

142. **Only the Council or Assembly may request advisory opinions:** While both bodies have an equal right, the Council has exercised it exclusively, having requested every one of the twelve opinions. This exclusive practice has become possible through the advantage possessed by the Council in the matters of procedure and frequency of meetings. The exclusion of the Assembly is, however, a matter of policy as is indicated by the Geneva Protocol, adopted unanimously by the Fifth Assembly, wherein requests for advisory opinions were to be limited to the Council and its committees on arbitration. On this point, the General Report, accompanying the Protocol, stated that "the transmission of a question to the Permanent Court of International Justice must always be entrusted to the Council because, in practice, the latter is the only body competent for such purposes." [5]

143. **States and international organizations may obtain advisory opinions through the Council or Assembly:** At the time of the drafting of the Statute, Argentina submitted a proposal that states be granted this privilege but the proposal was rejected by the Third Committee of the First Assembly on the ground that the right of a state to obtain such opinions might lead to an indirect way of introducing obligatory jurisdiction or unilateral arraignment. The International Labor Office suggested an amendment to the effect that the Court

[5] *League of Nations Doc., A. 135,* 1924, p. 11.

should give an advisory opinion upon any question or dispute of an international nature referred to it by the Council or Assembly or by the Administrative Council of the International Labor Bureau or by the General Labor Conference. This proposal was rejected. The rule, therefore, is that any state or organization desiring to obtain an opinion from the Court must do so through the Assembly or the Council, and preferably the latter.

144. **Agreements to submit matters for advisory opinions have been entered into between the Council and certain states:** An illustration is afforded by the agreement concerning the Aaland Islands, concluded between Finland, Sweden and the Council annexed to the Resolution of the Council of June 24th, 1921, wherein the Council made its award in the Aaland Islands dispute. The agreement provides that the Council is to watch over the application of the guarantees contained in the Resolution; that Finland shall forward to the Council, with its observations, any petitions or claims of the Assembly of Aaland in connection with these guarantees; and the Council shall, in any case where the question is of a juridical character, consult the Court. In another instance, Latvia on July 7th, 1923, in making a declaration to the Council on the subject of the protection of minorities, reserved the right to request that differences of opinion on questions of law or fact, arising from the declaration, be referred to the Court for an advisory opinion. Esthonia also made a declaration to the Council concerning the protection of minorities, which declaration was accepted by a Resolution of the Council on September 17th, 1923. The resolution provides that any differences of opinion with regard to it may be referred to the Court for an advisory opinion.[6] These provisions appear to arise from a desire upon

[6] In the case of Latvia and Esthonia these Declarations were exacted as conditions of admission to the League. (See *Security Against War*, pp. 43, 80.)

the part of small states to make mandatory upon the Council the consultation of the Court upon legal questions in matters wherein the Council acquires the right to interfere in the domestic affairs of a state; thereby safeguarding in a measure a state from possible political interference by the Council.

145. **The scope of the questions to be submitted is unlimited:** The Advisory Committee of Jurists limited this scope to international cases or questions. The present broad provisions make it possible to request an opinion upon any subject—domestic or national—legal, economic, social or military; and to submit any controversy for such opinion. As has been seen, advisory opinions may take precedence over other forms of jurisdiction; for the Council may request an opinion concerning matters which states have agreed to submit for judicial decision under obligatory jurisdiction; or the Council may intervene at any point between the parties and the Court.

146. **The consent of the parties in interest is not necessary for the submission of a question to the Court for an opinion:** There is no consistent rule, for the matter is discretionary with the Council whether states or parties shall consent to submission. In the matter of the Netherlands delegate, the consent of the Netherlands Government was not obtained. In the matter of the agricultural labor disputes, the consent of the Governing Body of the International Labor Office was not obtained. In the matter of Eastern Carelia, the consent of Russia was not obtained. In the matter of the German Settlers in Poland, the consent of Germany was not obtained and Poland opposed the submission up to the last moment. In the matter of the Tunis and Morocco Nationality Decrees, the consent of Great Britain and France was obtained. In the matter of Jaworzina and the Monastery of Saint Naoum, the consent of the Conference of Ambassadors and of the states involved

was obtained. In the matter of the Exchange of Greek and Turkish Populations the Turkish and Greek Governments agreed to the submission. In the matter of the Danzig Postal Service the two contesting parties appear to have agreed. In the matter of the Turkish Iraq boundary, Great Britain appears to have agreed, but the Turkish Government is not represented in the proceedings of the Court.[7] The rule is established that the Council may, if it so desires, submit a question without the consent of the parties involved.[8]

147. The question may be framed either by the parties or by the Council: In the matter of the Netherlands delegate, the International Labor Office framed the question. In the matters concerning agricultural workers and agricultural research, France and the Council framed the question over the protest of the Director of the International Labor Office. In the matter of the Tunis and Morocco Nationality Decrees, the two parties appear to have framed the question. In other cases submitted for advisory opinions, the question was framed by the Council and the resolution containing the question was read in the presence of the parties wherever such parties were members of the League and were represented in accordance with Article 4 of the Covenant. The Geneva Protocol undertook to frame a rule to the following effect: When the parties agree to arbitrate they will frame the question; when only one party is in favor of arbitration it and the Council will frame the question; but when both parties fail to ask for arbitration then the Council will have full rights to frame the question

[7] Official records are not yet available in this case.

[8] On this point Mr. P. J. Noel Baker, in his recent volume, *The Geneva Protocol,* observes— "However much one party may resent a demand by the other for an advisory opinion, it is almost impossible for it to resist it publicly * * * but even if such resistance occurred, the Council would almost certainly overrule it." * * * (p. 42.)

for submission to the Court for such an advisory opinion.[9]

148. **Whether the vote of the Council shall be unanimous in taking a decision to request an advisory opinion is not determined:** According to Article 5 of the Covenant, decisions require the agreement of all the members represented at the meeting except when otherwise provided for. The exceptions relate to matters of procedure and to decisions taken by the Council under Article 15 in matters submitted to it for inquiry. Article 4 of the Covenant provides that any member of the League, not represented on the Council, is entitled to be represented during the consideration of all matters affecting its interests and that each member represented on the Council shall have a vote. The Council may decide to request an advisory opinion in cases arising under Article 11 where it seems unanimity, including the vote of the parties, is required; or in connection with an arbitration under Articles 12 and 13, where the rule is uncertain unless the usual arbitral rule of a majority prevails; or in connection with an inquiry, under Article 15 where it is specifically stated that unanimity does not include the vote of the parties. But all of these rules are subject to the question whether the request for an opinion may be regarded as one of procedure. If so, a majority vote is sufficient for submission.[10] It appears, however, that no provision is made for representation by a non-member state which

[9] The assignment of the right to frame the question for submission to arbitration is not generally acceptable to states. For the reservation made by the United States on this subject, in its ratification of the Hague Convention of 1907, see p. 76.

[10] Mr. P. J. Noel Baker, in *The Geneva Protocol,* states that the Council can make no recommendation under Article 11 of the Covenant except with the consent of the parties represented (p. 79); and that unanimity is not necessary in requesting an advisory opinion, for the Council could as a matter of procedure and by majority vote ask for such an opinion (p. 42).

is a party, nor for the inclusion of its vote.[11] The question is one of considerable importance, involving the right of the Council to proceed without the consent of the state.

149. **The Court regards as discretionary its duty to grant advisory opinions:** Following the English version of Article 14 of the Covenant, the Court has adopted the principle that it may exercise discretion in granting advisory opinions. The issue was presented in the matter of the Status of Eastern Carelia which involved Russia, a non-member of the League and not a signatory to the Covenant under which the Court was asked by the Council to grant an opinion. The Court declined to give an opinion upon the question submitted, on the ground that to do so would be to violate a clear rule of international law, namely, that no state may be bound to submit a dispute to pacific settlement under an instrument to which it is not a party.[12]

150. **The Council regards as mandatory the obligation laid upon the Court to render opinions:** Three-fourths of the business of the Court has consisted of rendering advice to the Council.[13] All of the matters submitted have involved an

[11] The question submitted to the Court in the matter of Iraq concerns the interpretation of the unanimous vote. A judicial opinion, having a bearing upon the general question of unanimity may be the result. See Annex I for the precise questions involved.

[12] This opinion was rendered by a divided Court, there being four dissenting judges; M. Weiss (France), M. Nyholm (Denmark), M. de Bustamente (Cuba), and M. Altamira (Spain). A change in two votes in favor of a contrary rule is, therefore, necessary to reverse this opinion. See Annex I.

[13] The questions submitted were the following:

(1) Seating of the Workers' Delegate from the Netherlands; (2) Competence of the International Labor Organization in regard to agricultural labor. (3) Competence of the International Labor Organization to examine proposals for the development of methods of agricultural production. (4) Nationality Decrees in Tunis and Morocco. (5) Status of Eastern Carelia. (6) German Settlers in

actual right. In but one instance, that of Eastern Carelia, has the Court declined to render an opinion on the questions submitted. On this occasion it established its right to exercise its discretion, a position with which the Council is not in accord. At a meeting wherein the Council considered this opinion it discussed the adoption of a resolution stating its conviction that the opinion expressed by the Court in connection with the procedure prescribed in Article 17 of the Covenant, cannot exclude the possibility of resort by the Council to any action, including that of requesting an advisory opinion, on a matter in which a non-member of the League was unwilling to give information, if the circumstances made such action necessary. As this resolution appeared to remonstrate with the Court, the Council contented itself with merely *noting* the opinion; but this conclusion was reached only after Viscount Cecil had made it clear that the opinion of the Court was not intended to lay down any general rule of law to be applied by the Court in future matters.[14] The fact that the Council was not in a position to coerce Russia, as provided for under Article 17 of the Covenant, is not to be construed as an acceptance in principle of the view of the Court.

151. **The Court has had formulated the general conclusions underlying advisory practice:** These are to be found in a memorandum prepared by Mr. Moore at the request of

territory ceded to Poland. (7) Acquisition of Polish nationality. (8) Delimitation of the Polish-Czechoslovakian frontier at Jaworzina. (9) Delimitation of the Albanian boundary at the Monastery of Saint Naoum. (10) Exchange of Greek and Turkish populations. (11) Polish postal service in Danzig. (12) The Iraq boundary.

[14] The Council, in retaining its right to reopen the question, apparently followed the French version of Article 14 of the Covenant as interpreted by the Advisory Committee of Jurists and by the Third Committee of the First Assembly, to the effect that the Court shall give an opinion. See also, the Patriarch and the Iraq boundary wherein the Council has requested an opinion concerning a non-member State. Annex I.

the Court. The conclusions are as follows:[15] (1) The constitution of the Court contains no express provision for advisory opinions, an article to regulate such opinions being deliberately rejected. (2) A consideration of the two official texts (Article 14 of the Covenant) where alone the subject is mentioned, cannot be regarded as imposing on the Court an obligation to render such opinions. (3) The giving of advisory opinions, in the sense of their having no obligatory character, either in actual disputes or on theoretical questions, is not an appropriate function of the Court of Justice. (4) The exercise of the function of giving advisory opinions is at variance with the design of the Court which is to advance between nations the principle and method of judicial decision. (5) Opinions having no binding force would tend, not only to obscure but also to change, the character of the Court. (6) Opinions will necessarily diminish the judicial opportunities of the Court, for if the opinions are treated as binding they tend to preclude subsequent submission for judicial decision; while, if disregarded, they tend to bring the Court into disrepute. (7) Advisory opinions tend to prevent the Court from performing one of its primary functions, namely, contributing through its jurisprudence to the development of international law. (8) Such opinions would, so far as concerns the interests of particular nations, involve the possibilities of prejudice which led to the insertion in the Statute of the clause for the intervention of governments in pending litigation. (9) The Court should not seem to invite requests for advisory opinions. (10) There should be no special regulations concerning advisory opinions but the Court should deal with each application according to its nature and merits.

152. **With these conclusions the Council appears not to be in entire accord:** The Council believes that the Court

[15] *P. C. of I. J., Series D,* No. 2; p. 397.

should give an opinion whenever requested; the Court held that it may exercise its discretion when there is a clear rule of law to the contrary. The Council believes that the chief function of the Court should be advisory to its adjudications; the memorandum regards this tendency as a limitation upon the judicial opportunities of the Court. The Council desires to retain general control over the settlement of disputes, strengthening its position with opinions from the Court on legal questions; the memorandum views this tendency as possibly altering the fundamental design of the Court which is to advance between nations the principle and method of judicial decision. The divergence in views suggests the necessity for a more precise delimitation of the duties of the three branches of the League.

153. **The Rules of the Court prescribe no fixed procedure for advisory opinions:** Contrary to the prevailing belief, there is no prescribed procedure to be followed in the rendering of advisory opinions. The Covenant and the Statute remain silent, leaving to the Court full authority to prescribe the procedure. This may take a general form to be applied to all disputes or it may vary for each controversy. The rules adopted are in accordance with the memorandum which concluded that the matter should be left open.[16] They provide: (1) The full Court shall render opinions. (2) The opinions of dissenting judges shall be attached to the opinion of the Court. (3) Questions upon which an advisory opinion is requested shall be laid before the Court by means of a written request from the President of the Assembly or Council, or from the Secretary-General of

[16] On this point, the memorandum by Mr. Moore concludes: "Taking into account the various phases of the subject, it may be preferable that there should be no special regulation concerning advisory opinions, but that, if an application for such an opinion should be presented, the Court should then deal with the application according to what should be found to be the nature and the merits of the case." (*P. C. of I. J., Series D,* No. 2; p. 398.)

the League, acting under instructions from either of these bodies. (4) The request shall contain an exact statement of the question and shall be accompanied by documents throwing light on the subject. (5) The Registrar shall notify all members of the League and states mentioned in the Annex to the Covenant and the parties of the request; also, any international organizations which are likely or able to furnish information. (6) Any opinion which may be given, together with the request therefor, shall be printed and published.[17]

154. **The Court has thus far followed a procedure similar to that laid down in the Statute for judgments:** Representatives of the states whose interests are affected, agents and counsel are permitted to appear and present arguments and briefs in the same manner as when a judgment is involved. The adoption of this temporary procedure is responsible for the belief that advisory opinions constitute judicial decisions.

155. **Certain rules of procedure laid down in the Statute for judicial decisions are not applicable to advisory opinions:** Instances include the following: (1) In an advisory proceeding, even one involving an actual controversy, a party having no national on the Court is not entitled to appoint one although the other party may retain its national if one is already on the Court. (2) Recourse cannot be had to special chambers for labor or transit or for summary procedure in an advisory proceeding, owing to the rule that the full Court shall render the opinion. (3) A party having a legal interest cannot intervene; but it is entitled to be heard.[18] (4) The Court may not

[17] Rules 71–74 of the Permanent Court of International Justice.

[18] On this point, Mr. Moore concludes in his memorandum:

> That the rendering of such opinions would, so far as concerns the views or interests of particular nations, involve all the possibilities of prejudice which led to the insertion in the Statute of the clause providing for the intervention of governments in pending litigation. (*P. C. of I. J., Series D,* No. 2; p. 398.)

propose provisional remedies pending a decision, for it is confined to the precise question submitted. (5) The rule with respect to deciding a matter *ex aequo et bono* does not apply, for there are no parties. (6) The opinion, being limited to the precise matter involved in the question submitted, the Court may not prescribe a legal remedy. It is not, therefore, a fair inference that states have identical rights under both procedures especially as concerns intervention.[19]

156. **An advisory opinion is not generally regarded as the exercise of a judicial function:** There is no dictum to this effect; but in the memorandum prepared by Mr. Moore at the request of the Court he made a distinction between opinions and judgments. In his conclusion he states that "the emission of such opinions would necessarily diminish the opportunities for the exercise by the Court of its judicial functions."[20] It may also be pointed out that Article 14 of the Covenant does not limit to judicial matters the questions to be submitted to the Court for an opinion and the Court may, therefore, be called upon to consider matters which are not of a judicial

[19] A request for intervention was made by Roumania in the matter of the acquisition of Polish Nationality (Opinion No. 7), on August 25th, 1923, under Articles 62 and 63 of the Statute and under Articles 58–60 of the Rules on the ground that inasmuch as the Polish and Roumanian Minority Treaties contained identical provisions, an interpretation by the Court of the former instruments affected the interests of the latter. The reply of the Court, however, states that the question of interpreting Article 4 of the Polish Minority Treaty, being submitted to the Court only for advisory opinion, Articles 62 and 63 of the Statute and Articles 58–60 of the Rules cannot be considered applicable. At the same time the Court indicated its willingness to hear the Roumanian representative under Article 73 of the rules of the Court under which states and organizations may furnish information to the Court. (*P. C. of I. J., Series C,* No. 3; Vol. III, p. 1089.

[20] *P. C. of I. J., Series D,* No. 2; p. 398.

nature. It is contended that because the Court has thus far applied to opinions the procedure which it is required to use for judgments, that in itself constitutes the rendering of an opinion a judicial function. In answer to this contention it may be observed that the procedure for *judgments* is prescribed in the Statute and is mandatory upon the Court to apply, whereas no procedure whatever is prescribed for advisory opinions either in the Statute or in the rules adopted by the Court. This means that the Court occupies the same position as an arbitral tribunal; for it may adopt for any question submitted for an opinion any procedure which it sees fit; except in an arbitral tribunal the parties have a voice in its selection. A procedure, resting wholly in the discretion of the Court is not of the stable quality required by the Statute for a judicial function. Advisory opinions appear, also, to be lacking in certain other essentials of a judicial function. They do not conclude nor vindicate any right; they result in no judgment and no decree; they are binding upon no one; and they possess no certain sanctions. The matters before the Court illustrate the difference In the *judgment* concerning the S. S. "Wimbledon," the Court decided that Germany had violated the Treaty of Versailles and it assessed the exact damages to be paid. In the *judgment* concerning the Mavrommatis case, the Court determined the precise rights under the Mandate and under the Concessions Protocol and Great Britain agreed to observe the terms of the judgment. On the other hand, in the *opinion* concerning the German settlers in Poland, the Court determined a question of law but had nothing whatever to say concerning the reinstatement or compensation of the settlers who had been evicted. In the *opinion* concerning the acquisition of Polish nationalities, the matter dealt with therein was later submitted to arbitration. In the *opinion* concerning the Monastery of Saint Naoum the Court supported the decision taken by the Conference of Ambassadors which body afterward, in agree-

ment with the parties, reversed its own decision. In the *opinion* concerning the Danzig Postal Service, the application of an opinion of the Court depended upon a delimitation of territory, not prescribed at the time of the opinion, but which territory the Court was not permitted to delimit. For these practical reasons it is demonstrable that the exercise of advisory jurisdiction is not a judicial function as it is ordinarily understood in the United States.[21]

157. **Advisory opinions do not in themselves constitute a settlement of disputes between parties, for they are incomplete and they are not final:** Under the prevailing practice, an opinion ordinarily determines a legal question which has arisen in the course of an adjudication. Such an opinion may be requested through the Council by other tribunals, as, for instance, arbitral tribunals; or by the Conference of Ambassadors as occurred in the disputes concerning Jaworzina and Saint Naoum; or it may be requested, when a deadlock occurs in diplomatic negotiations as in the matter of the Nationality Decrees in Tunis and Morocco; or it may be requested by the Council in the course of its own adjudications. The primary object of an advisory opinion is to settle a point of law, thus advising the Council or other tribunals how to proceed with the settlement;[22] or to re-establish amicable relations between the parties. Its advantage is that it provides an additional step enabling the parties or other tribunals to proceed with a settlement; its disadvantage is that it deprives the Court of an opportunity to apply judicial decisions to the merits of the controversy and thus advance the cause of justice.

158. **Opinions are not binding:** The Council or Conference or other tribunal seeking the opinion is free to accept, reject,

[21] See succeeding chapter on Advisory Opinions in the United States.

[22] An instance is afforded in the matter of the Iraq boundary.

modify or adapt the opinion. An opinion has no validity, whatever, except through the affirmative act of the body requesting it. When an opinion is received from the Court, the Council may transmit it to the parties without recommendation as it did in the labor controversies; or the Council may transmit the opinion with a recommendation as it did in the matters of Saint Naoum and Jaworzina to the Conference of Ambassadors; or the Council may interpret the opinion in terms of a recommendation as it did in the matter of the Polish settlers; or the Council may leave the matter to the parties as it did in the matter of the Nationality Decrees in Tunis and Morocco; or, finally, the Council may leave the matter in abeyance as occurred in the matter of Eastern Carelia. The rule is that an opinion has no binding effect except as the parties or the Council or other tribunal voluntarily embodies its substance in an award or an agreement.

159. **For members of the League advisory opinions are applicable within the terms of the Covenant:** When the Council, by resolution, makes a recommendation embodying the substance of the opinion, that recommendation is conditioned by the Covenant and has precisely the same applicability as recommendations made without the advice of the Court. States may, therefore, refuse to accept the recommendation and proceed to war; or if one accepts the recommendation, the other party is bound not to resort to war. The rule is that, in the absence of special agreements to the contrary as, for instance, acceptance of the opinion in advance, the obligations assumed by members under the Covenant condition the application of advisory opinions to members of the League. For non-members refusing its jurisdiction, the Court will grant no opinion, if it follows the Eastern Carelian precedent; for non-members accepting its jurisdiction, the provisions of Article 17 of the Covenant will apply.

160. None of the matters submitted for an advisory opinion has been submitted subsequently for a judgment: Of the eleven matters wherein an advisory opinion has been rendered all have involved a legal question affecting an actual controversy. Some of these controversies were suitable for submission for a judicial decision, but were withheld primarily by reason of their alleged political character. It is, therefore, a fair inference that the chief business of the Court has been that of a consultative character.

161. The Rules of the Court preclude its rendering secret or confidential opinions: Present apprehension on this score should be set at rest by the rule adopted by the Court wherein the request must come in writing from the Council; it is circulated to members of the League; and all opinions are published. So long as the rule endures, there is no danger of secret opinions; but it is subject to alteration by the Court.

162. Proposals in the United States indicate a division of opinion: The Harding-Hughes proposal makes no reference to advisory opinions.[23] The late President Harding, in an address delivered in St. Louis on June 21st, 1923, following the submission to the Senate of the Harding-Hughes proposal,

[23] In an address delivered before the American Society of International Law on April 27th, 1923, Mr. Hughes is reported to have stated that: "the Court recognizes that it may be called upon by the Council or Assembly of the League for advisory opinions. This is a practice similar to that which has obtained in most of the states of New England from Colonial days. It now obtains in Massachusetts, New Hampshire, Maine, Rhode Island, Florida, Colorado, and South Dakota. The Permanent Court of International Justice has adopted rules upon this subject so as to assimilate the process so far as possible to a judicial proceeding, and especially so as to exclude any supposition that advisory opinions may be rendered in a diplomatic sense and without publicity." From this statement it may be inferred that Mr. Hughes believed a reservation concerning advisory options to be unnecessary.

suggested that advisory opinions either be abolished or extended to states.[24] This proposal has not been incorporated in any recommendations submitted to the Senate. When Mr. Coolidge acceded to the presidency, he adopted the proposals in the Harding-Hughes plan; but he has made no pronouncement concerning advisory opinions.[25] The Republican party platform, in 1924, contained an endorsement of this stand, making the issue a party matter.[26] Senator Pepper's resolution, providing for a separation of the Court from the League, eliminated in Article 1 of the Statute the reference to Article 14 of the Covenant which may be construed as relieving the Court of the obligation to render such opinions. Senator Lodge's resolution, having also for its object the separation of the Court and the League, added a section to the Statute wherein it restricted the application of advisory opinions concerning

[24] Text of Mr. Harding's reference follows:

"The exclusive privilege now held by the League to seek advisory legal guidance from the Court might either be abolished, or, more wisely, perhaps, be extended to any member or group of member nations. Thus all would be served alike, subject as now to determination by the Court itself of the kind of questions upon which it would render judgments."

[25] In an address delivered at Arlington on May 30th, 1924, the President is reported to have said: "I should not oppose other reservations, but any material changes which would not probably receive the consent of the many other nations would be impractical."

[26] The provision in the Republican platform was as follows:

"The Republican Party reaffirms its stand for agreement among the nations to prevent war and preserve peace. As an important step in this direction we indorse the Permanent Court of International Justice and favor the adherence of the United States to this tribunal as recommended by President Coolidge. This Government has definitely refused membership in the League of Nations and to assume any obligations under the covenant of the League. On this we stand."

issues involving the United States.[27] Senator Swanson, in his first resolution embodying the Harding-Hughes proposals, made no reference to advisory opinions; but the second resolution contained a provision intended to safeguard the interests of the United States. The phrasing of this provision appears to permit of a certain ambiguity.[28] It conveys the impression that there is some provision in the Statute which will enable the United States to join in a request for an advisory opinion. The Statute contains no reference whatever to advisory opinions. Should the United States desire to join in the request for an advisory opinion, it will make its request to the Council in the same manner as do other states or organizations under Article 14 of the Covenant. It may do so without adherence to the Statute, the will of the Council being supreme. The proposed amendment offers no protection against the exercise of the right of the Council to request an opinion concerning matters affecting the interest of the United States and it

[27] The text of this Article is as follows:

The Court shall not have jurisdiction to render advisory opinions on any question which affects the admission of aliens into the United States, or the admission of aliens to the educational institutions of the several states or the territorial integrity of the several states of the United States or concerning the question of the alleged indebtedness or money obligations of any state or the United States or any question which depends upon or involves the maintenance of the traditional attitude of the United States concerning American questions, commonly described as the Monroe Doctrine, or other purely governmental policy or any question which is considered by the Government of the United States to be a domestic question.

[28] The text of the Article follows:

The United States shall be in no manner bound by an advisory opinion of the Permanent Court of International Justice not rendered pursuant to a request in which it, the United States, shall expressly join in accordance with the Statute for the said Court adjoined to the Protocol of Signature of the same to which the United States shall become signatory.

offers no protection against consideration by the Court of the request. What is needed is an understanding whereby the Council will not undertake to *submit* a question to the Court without the consent of the United States.

163. The position of the Court in the matter of Eastern Carelia does not offer a sufficient guarantee for non-member states: In that opinion the Court held that it had no jurisdiction under international law when a non-member of the League declined to submit to its jurisdiction, inasmuch as it was not a signatory to the Covenant under which the question was submitted. This opinion is subject to reversal, having been delivered by a divided Court after considerable debate. That occasion for such reversal may arise, was proved in March, 1925, when the Council submitted for an advisory opinion, upon request of Greece, the question of the expulsion of the Oecumenical Patriarch from Constantinople, over the protest of Turkey, which country refused to appear before the Court. An embarrassing situation was prevented by withdrawal of the Greek appeal.

164. None of the proposals now pending in the Senate affects questions of fundamental concern to the United States: The references to advisory opinions in the pending proposals in no way affect the fundamental questions raised in Mr. Moore's memorandum which are a chief concern of the United States, namely: (1) The giving of advisory opinions, having no obligatory character, is not an appropriate function of the Court; (2) the exercise of advisory functions does not advance the application of the principle and method of judicial decision; (3) the emission of opinions having no binding force will change the character of the Court; (4) the granting of such opinions is diminishing the judicial opportunities of the Court; and (5) the excess of opinions over

judgments hampers the contribution of the Court to the development of international law. To these obvious dangers may be added that of the Court as legal adviser to the Council in the settlement of disputes which are within the competence of the Court to settle; the possible extension of advisory opinions to cover all forms of jurisdiction including obligatory; the submission of matters affecting parties or states without their consent; and, finally, vesting in a few states the exercise of a privilege, on its own terms, which all other states must accept if they would obtain advice from the Court. Therefore, if the United States desires to perpetuate the principles that national judges shall sit on the Court for all parties or no parties, that states and not agencies of the League shall have the right to opinions; that opinions shall not be sought in lieu of judgments in matters affecting the rights of parties; that states must consent if opinions are to be requested concerning their affairs; that intervention shall be permitted if the rights of a state are actually involved—then the Senate will state its understanding at the time of adherence. If, however, the United States desires to support other principles and to entrust to ten states a monopoly over the advisory competence of the Court, the subject will be ignored in the United States reservations and the United States may find itself in the position of certain of the Baltic states wherein, through conventions and treaties, they seek to limit the application of advisory opinions, under Article 14, to matters which do not infringe upon their national rights or domestic affairs.

CHAPTER XI

ADVISORY OPINIONS IN THE UNITED STATES

165. The Federal Judiciary does not offer a precedent for the practice of advisory opinions in the Permanent Court of International Justice: The question was decided in the negative early in the juridical history of this country. The instance concerned international relations with France and arose during the administration of Mr. Washington. Early in 1793, by direction of the President, Secretary of State Thomas Jefferson addressed to the Justices of the Supreme Court a communication soliciting their views upon the question whether their advice to the executive would be available in the solution of important questions on the construction of treaties, laws of nations and laws of the land. Chief Justice Jay and his associates answered the President that consideration of the lines of separation drawn by the Constitution between the three departments of government and the fact that they were judges of a court of last resort, afforded strong arguments against the propriety of deciding extra-judicially the questions submitted. They expressed the view that the power, given by the Constitution to the President, of calling on heads of departments for opinions "seems to have been purposely, as well as expressly, united to the executive departments."[1] That the Supreme Court might have been considered as entering the field of politics, had it granted such opinions, was suggested by Mr. Justice Marshall when he stated "considering themselves merely as constituting a legal tribunal for the decision

[1] *Correspondence of John Jay,* Vol. III, p. 486.

of controversies brought before them in legal form these gentlemen decided it improper to enter the field of politics by declaring their judgment on questions not growing out of the case before them."[2] The rule is, therefore, that while the President may require a written opinion from his cabinet, neither he nor Congress may require the Supreme Court to give them extra legal advice.[3]

166. Nine states have made provision for advisory opinions to be rendered to the co-ordinate branches of the state government by the Supreme Court or its justices: These provisions vary somewhat and it is necessary, therefore, to examine them in detail. *Alabama.* The state constitution contains no provision, but in 1923 a law was passed authorizing the Governor or either branch of the legislature to obtain written opinions on constitutional questions from the justices. The statute specifically stated that these opinions were not to be regarded as binding upon the state nor upon any department thereof nor upon the justices. The justices may request briefs from the attorney general and may receive briefs from other attorneys as *amicus curiae* on such questions as may be propounded to them. This act has been construed to mean that it contemplates merely an advisory opinion from the individual judge, and not from the Court and it is not binding; nor is it invalid as being an encroachment upon other departments.[4] A minority opinion expressed grave apprehension concerning the policy involved in the practice of advisory

[2] *Life of Washington, Ed. Phil.* 1807, V., 441.

[3] In the Federal Convention of 1787 it was proposed that "each branch of the legislature as well as the supreme executive shall have authority to require the opinions of the supreme judicial court upon important questions of law and upon solemn occasions." Nothing however came of this proposal.

[4] 209 Ala 593.

opinions.[5] *Colorado.* The constitution provides that the Supreme Court shall give its opinions upon solemn occasions when required by the Governor, the Senate or the House of Representatives and all such opinions shall be published in connection with the reported decisions. Interpreting the constitution, the Court has held: (1) That justices will decline to express any opinion on the validity or effect of acts purporting to be *completed* legislation since the provision was intended to avoid unconstitutional legislation by determining in advance the validity of proposed or pending acts.[6] (2) The question of whether the occasion is a solemn one each justice is to determine for himself, but in case of doubt the duty of the justice is to resolve that doubt in favor of the prerogative of the body propounding the question.[7] (3) The provision concerning advisory opinions will be applied only to cases where public rights are involved and even questions of this character should rarely be presented or considered.[8] (4) Statutes of long standing are not to be interpreted *ex parte.*[9] *Delaware.*

[5] The Minority response to the request includes the following statement:

It is impossible to read the opinions of the courts throughout the country without coming to the conclusion that the attitude of the judiciary generally has been unfavorable to the practice even in those states where it is expressly permitted by the constitutions . . . if the legislature may in this way obtain advisory opinions on any subject, it may, as the practice develops, obtain such opinions on all subjects, great or small, speculative or concrete, for the legislature has defined the limits of such requests for itself and may hereafter again define them according to its own pleasure. The legislature may with equal right and propriety summon the judges daily to appear at the bar of the House and Senate there to answer questions, for that, in effect though by indirection, is what is now done in this case. 209 Ala 603.

[6] In *re* Senate Res. 54 Col 262.

[7] 54 Col 165.

[8] Wheeler vs. Irrigation Co., 9 Col 248.

[9] Interrogatories, 62 Col 188.

The Revised Code of 1915 provides that the chancellor and judges, whenever the Governor shall require it for public information or to enable him to discharge the duties of his office with fidelity, shall give him their opinions in writing, touching the proper construction of any provision in the constitution of the state or of the United States or the constitutionality of any law enacted by the legislature of Delaware. This provision has been interpreted to mean that the only thing the chancellor and judges are called upon to do when replying to an inquiry as to the constitutionality of a statute is to express an opinion thereon.[10] *Florida.* The constitution provides that the Governor may at any time require the opinion of the justices of the Supreme Court as to the interpretation of any portion of the constitution or upon any question affecting his executive powers and duties and the justices shall render such opinions in unity.[11] These provisions lay down a narrower policy than in other states in that the authority is confined to the Governor; and he may request an opinion concerning only that portion of the constitution which affects his executive powers. *Maine.* The constitution adopted in 1819, provides that justices of the Supreme Court shall be obliged to give their opinion upon important questions of law and upon solemn occasions when required by the Governor, Council, Senate or House of Representatives. A number of opinions have been rendered interpreting "a solemn occasion" of which the following are illustrations: (1) The Governor requested an opinion in relation to his power to remove a county attorney. The justices declined to advise on the ground that the facts stated did not indicate that any solemn occasion existed within the meaning of the constitution; and for the further reason that the question could be speedily determined in a judicial

[10] In *re* School Code, 30 Del 406.
[11] Advisory Opinions, 61 Fla 1.

proceeding which might be instituted under the statute.[12] (2) An opinion was requested in the matter of private rights. The justices were of the opinion that it did not constitute a solemn occasion and it would be improper for them to express an opinion upon such rights except in the performance of their judicial duties. (3) The justices were requested to give to the Senate an opinion on questions involving the power of the legislature "to prohibit, regulate or restrict the cutting or destruction of trees growing on wild or uncultivated land by the owner thereof without compensation therefor to the owner, in order to . . . prevent or diminish injurious erosion of the land, and the filling up of the rivers, ponds and lakes." On that occasion the justices declined on the ground that a citizen shall not be deprived of his life, liberty, property or privileges except by the law of the land which hears before it condemns and which proceeds upon inquiry and renders a judgment only after trial. *Massachusetts.* The constitution provides that each branch of the legislature, as well as the Governor and Council, shall have authority to require opinions of the justices of the Supreme Court upon important questions of law and upon solemn occasions.[13] Many opinions have been rendered interpreting this provision, and laying down a definite policy.[14]

[12] Opinions of Justices 85 Me 546.

[13] In 1820 there was a movement in Massachusetts to repeal the provisions authorizing advisory opinions. The Committee of which Judge Story was chairman recommended that it was inexpedient to retain the provision. The resolution was agreed to by a large majority in the Convention but was defeated at the polls. (2 *Mass. Law Rev.* Quar. p. 549.)

[14] Opinions have been given when required by the Governor and Council upon questions of law affecting the constitution of the Council; or involved in the exercise of the power of the Governor to veto bills or resolves; power vested in him as commander-in-chief of the militia; his power to appoint or remove public officers, or to pardon offenses; or in the discharge of duties imposed upon the Governor and Council by statute, such as issuing warrants for the payment of claims against

New Hampshire. The constitution provides that each branch of the legislature, as well as the Governor and Council shall have authority to require the opinion of the justices of the Superior Court upon important questions of law and upon solemn occasions. Interpretations of the provision establish the principle that justices, in reaching conclusions, given in response to an application from the Governor, cannot receive evidence nor determine questions of fact;[15] and the three branches of the government shall remain independent and not encroach upon each other.[16] *Rhode Island.* The constitution provides that the judges of the Supreme Court shall in all trials instruct the jury in law. They shall also give their written opinion upon any question of law whenever requested by the Governor or by the house of the general assembly. *South Dakota.* The constitution provides that the Governor shall have authority to require the opinions of the judges of the Supreme Court upon important questions of law involved in the exercise of his executive powers upon solemn occasions.

167. The policy adopted by these nine states establishes the following common principles: (1) Justices, not the Court, grant the opinions. (2) The executive and legislative

the commonwealth, or canvassing returns of votes for public officers.—Opinions have been given to the Senate or House, upon the construction and effect of the constitution and of existing statutes, with a view to further legislation; upon questions whether a bill has been so laid before the Governor as to become a law by lapse of time without his approval; upon questions relating to the votes for Governor and Lieutenant-governor which are directed by the constitution to be counted by the Senate and House; or to the election of councillors while such election was required by the constitution to be made by the two houses; or to the election returns or qualifications of senators or representatives of which the Senate and House respectively are the final judges.

[15] 76 N H 601.

[16] 56 N H 574: 67 N H 600.

branches of the government consult their judicial department as their counsel; and in some instances the privilege is restricted to the executive department. (3) The matters upon which the Court is consulted are strictly limited and do not include litigious matters. (4) Opinions thus rendered are not binding upon any department of the state government. (5) The procedure is informal and non-judicial. (6) Thirty-nine states of the Union have not favored advisory opinions and the policy is therefore one pertaining to a small minority of states.

168. Four states have experimented with advisory opinions and rejected them: Minnesota adopted a statute in 1859 which provided that either house may by resolution request the opinion of the Supreme Court or any one or more of the judges thereof shall give an opinion in writing upon a given subject when requested to do so. This act was declared unconstitutional in 1865, the reason being that it was an encroachment of one department upon another. It was the opinion of the justices that the duty imposed on the Court to render opinions was neither a judicial act nor was it to be performed in a judicial manner. It constituted the Supreme Court the adviser of the legislature, nothing more. "This," said the justices, "does not come within the provisions of the constitution and as the constitution now stands would be, in our opinion, not only inconsistent with judicial duties but a dangerous precedent." The justices were unanimously of the opinion that the provision in the Statute imposing a duty on the Court was unconstitutional and void and they declined to grant an opinion.[17] The constitution of Missouri of 1865 provided that the judges of the Supreme Court shall give their opinions upon important questions of constitutional law and upon solemn occasions when required by the Governor, the Senate, or the House of Representatives; and all such opinions shall be pub-

[17] 10 Minn 78.

lished in connection with the reported decisions of the said Court. The constitution of 1875 eliminated the entire provision. The reason is to be found in the antagonism of the Court to advisory opinions, it having declined on several occasions to render such opinions and in other instances having defined within very narrow limits the power of the departments to request such opinions. "It is not contemplated," said the justices, "by the constitution that the judges are to give their opinion on any questions which may afterwards come before them for adjudication." [18] The constitution of Nebraska provides that the Supreme Court may, when requested by the legislature, certify to the legislature its conclusions as to desirable changes in the general laws. The authority is here strictly limited to pending or proposed legislation. In the minority opinion delivered in 209 Ala 593 the judge pointed out that in Nebraska the Court had passed a rule that it would answer no more questions. The public statute of Vermont provided that the Governor when the interests of the state demand it may require the opinion of the judges of the Supreme Court, or a majority of them, upon questions of law connected with the discharge of his duties; and the judges of the Supreme Court, or any of them, shall give an opinion in writing upon such questions. This law was enacted in 1864,[19] and repealed by an Act of 1915.

169. Two states have adopted advisory opinions with respect to criminal cases: In Oklahoma the Revised Statutes provide that the judge of a court at which a conviction requiring a judgment of death is had, must immediately after the conviction transmit to the Governor, by mail or otherwise, a statement of the conviction and judgment, and the testimony given at the trial; and that the Governor may, thereupon, require

[18] 51 Mo 586.
[19] Laws of 1864, No. 70.

the opinion of the judges of the Supreme Court, or any of the judges, upon the statement so furnished. In New York, Sections 493–4 of the Code of Criminal Procedure are similar to the Oklahoma statute. Article 494 was construed in a case wherein the defendant was convicted of murder and after the record of the case was transmitted to the Governor he requested the opinion of two advisers from the Supreme Court as to whether certain evidence was properly admitted, to which they returned an affirmative answer.[20] These provisions constitute a departure from the policy laid down in the nine states where advisory opinions may be requested by co-ordinate branches of the state government for the purpose of conducting more properly the business of the state.

170. **The practice followed in the nine states which retain advisory opinions is derived from the British practice:** This fact is established by various opinions which have acknowledged this source.[21] The most complete historical statement was made in a Massachusetts case wherein the development was traced from England to the United States.[22] In an opinion rendered in Maine it was stated that the practice of giving advisory opinions is a continuation and extension of a power and practice derived from England and exercised by the colonial governments of Massachusetts.[23] The essential principles of the British practice have been retained with respect to the authorization to submit questions, and the authorization to grant opinions and the manner of so doing.

171. **Only the Governor or branches of the legislature may request advisory opinions:** To this general rule there is no exception and but one limitation: it may be restricted only

[20] People v. Green, 1 Denio, 614.
[21] 209 Ala 593.
[22] 126 Mass 557.
[23] 95 Me 573.

to the Governor as in South Dakota. Article 14 of the Covenant is in agreement with this rule. Under this interpretation the Council and Assembly are considered to be co-ordinate branches of the League System, bearing a relation to the Court similar to that which the executive and legislative branches bear to the state supreme courts. Otherwise no analogy appears to exist.

172. **Advisory opinions are delivered by justices and not by the Court:** There are two exceptions to this rule—in Colorado where the Court delivers the opinion and in Florida where the justices are expected to render such opinions in unity. In all other instances one or more justices render the opinions. Article 14 of the Covenant is not in agreement with these provisions. It specifies that the Court may or will render such opinions and the Court has adopted rules putting into effect this stipulation.

173. **The practice of advisory opinions is limited to constitutional questions, solemn occasions and to interpreting the duties of the state executive:** This general rule is subject to limitations in scope but not in substance. In Alabama the opinions are restricted to constitutional questions; in Colorado to solemn occasions;[24] in Florida they are restricted

[24] In Maine the justices have held that a request from a Governor concerning his right to remove a county attorney does not constitute a solemn occasion (85 Me 546); also the question of whether the office of fish and game commissioner was an office of profit thereby precluding such officers from becoming a member of the legislature was not so regarded (95 Me 564). In South Dakota an opinion was sought concerning a statute providing for the assessment of railway, telephone and express companies which was declared repugnant to the South Dakota constitution by a decision by a United States court in a litigation between South Dakota and the American and Wells Fargo Co. The justices declined to render an opinion on the ground that the loss of expected revenue from taxation of these companies involved in such litigation did not constitute a solemn occasion.

to the interpretation of any part of the constitution or upon any question affecting the executive power and duties of the Governor; in Maine and Massachusetts such opinions may extend to important questions of law to be delivered upon solemn occasions; in Rhode Island they are restricted to questions of law; in South Dakota, to important questions of law involved in the exercise of the executive powers on solemn occasions. Article 14 of the Covenant is not in agreement with the provisions of these state constitutions and statutes. The Covenant authorizes the Council and Assembly to request an opinion upon any case and every question. Therefore, there can be no analogy between the competence of the justices of the state supreme courts and the Permanent Court of International Justice.

174. **The limitation placed upon advisory opinions precludes the submission of actual controversies or questions involving private rights:** This question was raised squarely in Colorado which is more friendly toward such opinions. The question propounded by the Senate involved the interrogation whether a public official had the right to hold over in office after an election. The Court held where private rights were involved the Court will not give an *ex-parte* opinion in response to such interrogatories; and that such rights would not be regarded as matters of "solemn occasions." [25] In another case the Court held that advisory opinions would be given in cases only where public rights were involved and even questions of this character should be rarely presented or considered.[26] The justices of the Supreme Court of Maine were not less emphatic, declining to express their opinion on questions of law concerning the rights of citizens, except in the performance of judicial

[25] 52 Col 166. There was a dissenting opinion to the effect that the legislature and not the Court should be the judge of what constitutes a solemn occasion.

[26] Wheeler vs. Irrigation Co., 9 Col 248.

functions.[27] Opinions, said the justices of the Massachusetts Supreme Court, may be rendered on questions of law but not on questions of fact.[28] In South Dakota, the justices declined to give an opinion concerning the validity of a proposed bond issue on the ground that it would amount to an expression of opinion without the bond holders having had an opportunity to be heard.[29] Under the American practice the parties cannot appeal to the Governor or legislature to obtain advice for them in the settlement of a dispute and if they do so the Court will decline to give an opinion as not being within the provisions of the Statute. The object of an advisory opinion is plainly to enable the executive to request an opinion in order that he may conduct the business of the state in a legal and effective manner; and to enable the legislature to enact constitutional laws. Under Article 14 of the Covenant an entirely different practice prevails. Parties can and do use the Council for the purpose of obtaining legal advice for the settlement of actual disputes. The object of an advisory opinion is clearly for the purpose of settling disputes which have nothing to do with the administration of the League or with conventions promulgated by that body. At this point all analogy between the American and League practices breaks down upon organization grounds.

175. **State justices in order to protect their proper jurisdiction strictly construe the provisions empowering them to grant advisory opinions:** In general, justices do not favor granting advisory opinions by reason of their purely advisory character and possible embarrassment which they fear may arise if the matter is submitted later to the Court for decision; and by reason of the dangers of encroachment of one department upon another. An illustration is afforded in South Dakota where

[27] 103 Me 514.
[28] 120 Mass 600; see also 76 N H 601.
[29] 34 S D 650.

the Governor alone has the right to request such opinions. He submitted a question at the request of the legislature upon the construction of a provision of the constitution. The justices declined to grant an opinion on the ground that the right to request such opinions is confined to such questions as raise a doubt in the executive department but not in the legislature.[30] Under Article 14 of the Covenant the Court of Justice, under the broad latitude allowed, has not the protection accorded to justices of state courts. The burden is, therefore, upon the Council to use circumspection in the submission of questions so as not to embarrass the Court; or cause its jurisdiction to be rejected.

176. It is not mandatory upon state justices to grant opinions whenever requested: The general practice is for justices to exercise their discretion with respect to whether the question comes within the terms of the constitution or statute and whether the Governor or legislature in making the request is acting within the rules of established law. For justices, in granting opinions, will take into consideration existing law. This rule obtains even when the terms of the Statute stipulate that the justices or Court *shall* give an opinion when requested. An illustration is afforded by Colorado. Its constitution provides that the Court *shall* gives its opinion, but the Court declined to give an opinion on the question whether a bill proposing to increase the fees of district attorneys throughout the state would apply to attorneys then in office, on the ground that the question did not relate to matters exclusively *juris publica* nor to the constitutionality of any act.[31] In Maine, an opinion was declined on the ground that the facts stated did not indicate that a solemn occasion existed within the meaning of the constitution and for the further reason that the matter might be

[30] 3 S D 548.
[31] 12 Col 466.

appropriately determined in judicial proceedings.[32] In Massachusetts, the justices declined to grant an opinion on the ground that it did not appear to what if any pending matter the question related, since the provisions of the constitution had been construed to mean that such opinions may be required only respecting pending matters, in order that assistance may be gained in the performance of a present duty.[33] The justices in South Dakota declined to grant an opinion on the ground that the matter presented was not one of urgent necessity justifying an *ex parte* opinion;[34] and only the gravest and most urgent necessity will justify the rendering of *ex parte* opinion on the request of the Governor where private rights are concerned.[35] Under Article 14 of the Covenant, the English text makes the granting of such opinions permissive while the French text makes it mandatory. But the interpretation accepted by the Court is analogous to the American practice, namely that the Court will use its discretion and in granting an opinion will have due regard to existing rules of international law. Inasmuch as both texts are authentic, the question is open to a different interpretation.[36]

177. **Advisory opinions are not binding upon either the Governor or legislature:** The general rule has been attested by a number of instances. The Alabama statute states specifically that the opinions are not binding upon any department of the government. In an opinion given by justices in Maine it was held that opinions have no judicial force and cannot bind nor control the action of any officer of any department.[37] Prof. Thayer is authority for the statement that advisory opinions

[32] Opinions of Justices, 85 Me 546.
[33] 211 Mass 630.
[34] 43 S D 645.
[35] 34 S D 650.
[36] For discussion of status of Eastern Carelia,—see Annex I.
[37] 58 Me 572; see also 72 Me 562.

have not the quality of judicial authority,[38] and that the single exceptional and unsupported opinion on this subject in the state of Maine made at a time of great political excitement,[39] and together with a doctrine, in the State of Colorado, founded upon considerations peculiar to its constitution, do not qualify the general rule. Under Article 14 of the Covenant, advisory opinions are not binding upon either Council or Assembly. The Covenant and Statute, being silent upon this point, and there being no authoritative interpretation, the question is still open to construction. The fact that the Council has accepted the opinions rendered, in principle, does not fix the rule, for no dictum has been pronounced.[40] The opinion is not binding upon the parties until voluntarily accepted or incorporated in the award of the Council; and then only to the extent to which members under the Covenant are bound by a recommendation of the Council.

178. Advisory opinions are not binding upon the Court when the matter subsequently comes before it for judicial

[38] The Origin and Scope of the American Doctrine of Constitutional Law, by Prof. James B. Thayer, 7 *Harvard Law Review,* p. 153.

[39] The reference is to 70 Me 583 wherein the question submitted by the Governor was whether he had a right under the constitution to summon a person to attend and take a seat in the Senate or House who by the official returns under the decision of the Court did not appear to be elected but defeated or not voted for; or would such summons be merely void as exceeding the power of the Governor. The opinion, among other things said that by the provisions of the constitution the Court was required to expound and construe the provisions of the constitution and statute. The law thus determined is the conclusive guide of the Governor and Council in the performance of their ministerial duties and any action on their part in violation of the provisions of the constitution thus declared is usurpation of authority.

[40] For reference to Geneva Protocol wherein the Assembly asserted its right to consider a domestic question after the Court had declared it to be such, see p. 171.

decision: There appears to be no exception to this rule. In New Hampshire, the justices expressed the view that they had not received aid from counsel and, therefore, their opinions must be regarded as impressions by which the Court will not feel itself bound should the bill become a law and if the rights of a citizen should depend upon its construction.[41] In Maine, the justices were of the opinion that advisory opinions were not within the principle of *stare decisis* but were merely opinions in the way of advice like those of counsel: and the justices giving them are in no degree bound to adhere to them when the same question arises should argument or further research or reflection change their prior views.[42] In Massachusetts, it has been held that in giving advisory opinions justices do not act as a court but as constitutional advisers to other departments of the government;[43] also when called upon to decide upon a matter coming before them as a court, the justices are bound most sedulously to guard against any influence flowing from their previous consideration in their advisory capacity.[44] Under Article 14 of the Covenant and the Court Statute, it has not been judicially determined whether advisory opinions are binding on the Court for no question submitted for an opinion has been resubmitted for a judgment, and the Court has uttered no dictum.[45]

179. **Opinions are reported among regular decisions but not for the purpose of using them as precedents:** Not all of the states publish the decisions, and, obviously, since the opinions have no binding quality and vary in their application

[41] 25 N H 537.
[42] 95 Me 564.
[43] 126 Mass 566.
[44] 233 Mass 603.
[45] See, however, Annex I, for summary of the opinion in the matter of Saint Naoum wherein the Court cited a previous advisory opinion.

by the recipients, they do not constitute precedents. On the contrary, the opinions are formulated with due regard for principles of law established by decisions. The practice of publishing opinions, together with documents, is more elaborately carried out by the Permanent Court of International Justice. Whether the opinions will constitute precedents is not determined; but that they may do so is possible, since Article 59 of the Statute refers only to decisions; and the procedure followed in advisory proceedings affords a sufficient legal ground for considering opinions as precedents.

180. The proceedings under which advisory opinions are rendered are informal and of a non-judicial character: As a rule, the parties are not heard, attorneys do not appear, briefs are not submitted and evidence is not taken in a proceeding for an advisory opinion. There are exceptions with respect only to the submission of briefs. The Alabama statute permits the Court to receive briefs. Early in the history of Massachusetts the justices appear to have had before them the written opinions of the attorney and solicitor general and of those who were interested adversely to the government.[46] This appears however to have been an isolated instance occurring in 1825. Certain justices have, however, expressed regret that they did not have the benefit from the investigations of interested parties and their learned counsel.[47] Under the rules of the Permanent Court of International Justice, the proceedings may be as informal and non-judicial as the practice by state justices. The Court has particularly avoided making any rules on the subject except that opinions shall be determined by the full Court. That the Court has chosen, up to the present time, to apply approximately the same rules of procedure which it uses for judgments does not affect its complete authority to follow any

[46] Referred to in the case of Adams vs. Bucklin, 7 Pick 121.
[47] 41 N H 552. See also 4 R I 324.

procedure it chooses. On the other hand, state justices by the very terms of the constitution or statute, are limited to an informal procedure since the Court does not formally render the opinion.

181. The rendering of advisory opinions is a non-judicial function: In each state where the provision has received interpretation the opinion is generally to the effect that the function is non-judicial. In the matter of the State Industrial Commission, Judge Cardozo has stated what is undoubtedly the prevailing rule.[48] But if further evidence is required concerning the status of such opinions, it will be found in an opinion in 209 Ala 593, wherein it is pointed out that the Act contemplates a non-judicial function;[49] also in 95 Me 572, wherein the justices said "they are merely opinions in the way of advice like those of counsel"; also in 126 Mass 566, wherein it was stated that justices do not act as a Court but as constitutional

[48] The rule, as stated, follows:

> The giving of such opinions is not the exercise of a judicial function. It is true that in England the custom of the constitution makes the judges of the high court the assistants of the Lords, and requires them upon the demand of the Lords to give consultative opinions. But that custom is a survival of the days when the judges were members of the great council of the realm. In the United States no such duty attaches to the judicial office in the absence of express provisions of the constitution. Even in those states e. g. Massachusetts, Maine and New Hampshire where such provisions are found the opinions thus given have not the quality of judicial authority. The judges then act, not as a Court but as the constitutional advisers of the other departments (224 N Y 13).

[49] "Judicial power," says Justice Miller, "is the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision." (*Lectures on the Constitution of the U. S.*, p. 314.) "The exercise of judicial power is limited to cases and controversies" was the dictum delivered in Muskrat vs. U. S., 19 U S 356.

advisers of other departments of the government; also in 60 N H 585, wherein the justices are said to act as constitutional advisers of either branch of the legislature. Under the Covenant, the question whether rendering advisory opinions constitutes a judicial function has received no judicial interpretation. But official utterances, other than a judicial decision, would indicate that in Europe such opinions, notwithstanding the application of a judicial procedure, are regarded to be non-judicial in the strict sense in which the term is used in the United States.[50]

182. Advisory opinions as practiced in the United States do not justify adherence of this country to the Court Statute on the basis of precedent or analogy:[51] The disparity between the two practices—that in the nine American states and that under Article 14 of the Covenant—is of a nature to indicate that a very different experiment is being tried in Europe from that in the United States. As has been seen, in the one instance only justices render the opinion while in the other it is the Court: in the one instance the subject is strictly limited while in the other it is unlimited: in the one instance opinions may not be applied to actual cases or rights of parties while in the other it has been applied to nothing else; in the one instance the constitution or statute protects the ultimate jurisdiction of the Court; in the other it is thrown open to invasion by requests for opinions; in the one instance the question of whether the Court may use its discretion is not open to doubt whereas

[50] For statement of official utterance, see p. 114.

[51] The six judgments rendered by the Court related to four cases arising under the Peace Treaties or from Conventions concluded thereunder. As such, these cases present no especial problem in American policy. A summary of these judgments will be found in Annex I, as follows: (1) The S S "Wimbledon"; (2 and 5) the Mavrommatis Palestine Concessions; (3 and 4) interpretation of the Treaty of Neuilly; and (6) German interests in Upper Silesia.

in the other instance the two texts permit of ambiguity; in the one instance the procedure can only be informal while in the other it can be anything the Court decides upon; in the one instance the opinions may not be used as precedents or as contributions to law, but are derived from law while in the other case the question remains to be determined. But greater than these differentiations, important as they are, is the profound truth that in Europe the authority for the settlement of disputes does not repose in the Court but in the Council whereas in the United States it reposes in the Court; and there is wholly lacking in the League System a specific division of duties corresponding to the American system. For these reasons, the discussion of advisory opinions as an element in the adherence of the United States to the Court Statute must rest, not upon a consideration of the constitutions and practice of the states of the United States, but solely upon the Treaty of Versailles and the practice of the League of Nations.

CHAPTER XII

JURISDICTION WITH RESPECT TO INTERNATIONAL LABOR

183. Part XIII of the Treaty of Versailles provided an organization for the improvement of labor conditions:[1] It establishes the International Labor Office under the immediate supervision of a Director and responsible to a Governing Body, as part of the League of Nations, with headquarters at Geneva, and provides for a General Conference of representatives of the members to be held not less than once a year. The general organization and procedure are prescribed, including the collection and distribution of information concerning all subjects relating to the international adjustment of conditions of industrial life and labor;[2] and, particularly, subjects it is proposed to bring before the General Conferences; and also the conduct of such special investigations as may be ordered by the General Conference. The Permanent Court of International Justice is, under Article 423,[3] authorized to settle any

[1] Part XIII of the Treaty of Versailles is also Part XIII of the Treaties of St. Germain and Trianon and Part XII of the Treaty of Neuilly.

[2] These include: (1) Labor is not a commodity; (2) right of association; (3) living wage; (4) eight-hour day; (5) one day's rest in seven; (6) abolition of child labor; (7) equal pay for equal work; (8) standard in each country should have regard to equitable economic treatment of all workers lawfully resident therein; and (9) system of inspection for women workers.

[3] Article 423. Any question or dispute relating to the interpretation of this part of the present Treaty or of any subsequent convention concluded by the members in pursuance of the provisions of this part of the present Treaty shall be referred for decision to the Permanent Court of International Justice.

question or dispute arising under the general provisions of the Treaty. Under this Article, the Court acquires jurisdiction over such questions as the following: (1) Whether delegates have been selected by states in accordance with Article 389 and whether they have been properly seated. (2) What subjects are included within the functions of the International Labor Office. (3) Whether items have been included upon the agenda in accordance with Article 402. (4) Whether conventions have been adopted in accordance with the prescribed procedure under Article 405. (5) Whether states have complied with Article 405 in seeking appropriate legislation or ratification. (6) Whether the protection afforded workers under existing legislation in the various states would be lessened by the proposed conventions.

184. **The Treaty provides for the calling of General Labor Conferences:** Delegates to these Conferences represent the employers and work people of each state and are selected by it in accordance with Article 389. They may be accompanied by advisers selected in the same manner. The Conference is authorized to refuse, by a two-thirds majority vote, to admit any delegate if it deems him not to have been nominated by the state in accordance with the Treaty. The agenda for the meetings contains the items which are to become the subject of recommendations or conventions. If objection is made, such an item may be retained only by a two-thirds majority vote of the Conference. When the Conference adopts a proposal it takes one or two forms: recommendations to be submitted to members for their consideration with a view to giving them effect through national legislation or draft conventions for ratification by members.

185. **The duty of member states is to secure the adoption of the proposals agreed to by the General Conference:**

When a draft convention is adopted, a member state agrees, in accordance with Article 405, to bring before its proper authority at the earliest practicable moment, not exceeding a period of eighteen months, such conventions for ratification. Should its government not ratify, the member has no further obligation and the convention is not binding; but if the convention is ratified then the state agrees to make effective its provisions. When a recommendation is adopted, each member agrees to bring it before its legislature for the purpose of enacting its provisions into a national law. When this duty is fulfilled, even though no legislation results, the state assumes no further obligation. The Permanent Court of International Justice is granted authority to hear and determine disputes arising under these provisions. In the event that a member state fails to bring a recommendation or draft convention to the attention of the proper national authorities, any other member is entitled to bring this failure to the attention of the Court.[4] Should a member fail to take the action necessary to make effective the provisions of a convention which it has ratified, any member may bring the matter to the attention of the International Labor Office which may refer the matter to a commission of inquiry.[5] The commission is authorized to consider the complaint, and prepare a report embodying its findings. Its findings and recommendations are submitted to the governments concerned, and, in the event that any such government does not accept the recommendation, it may make a complaint to the Court.[6] That tribunal may, therefore, be a Court of the first instance upon direct complaint or a Court of appeal from commissions of inquiry. The decision of the Court is final and it may affirm,

[4] Article 416 of the Treaty of Versailles.
[5] Article 411 of the Treaty of Versailles.
[6] Article 415 of the Treaty of Versailles.

reverse or vary any of the findings or recommendations of a commission of inquiry.

186. **The Court is authorized to indicate the nature of the sanctions in connection with the dispute arising under Article 405 of the Treaty of Versailles:** The Court may indicate the measures, if any, of an economic character which it considers to be appropriate and which other governments would be justified in adopting against a defaulting state.[7] The defaulting government, thus proceeded against, may be reinstated when it informs the Governing Body that it has taken steps to comply with either the recommendation of the com-

[7] The text of the Articles relating to sanctions follows:

Article 418. The Permanent Court of International Justice may affirm, vary or reverse any of the findings or recommendations of the commission of inquiry, if any, and shall in its decision indicate the measures, if any, of an economic character which it considers to be appropriate, and which other governments would be justified in adopting against a defaulting government.

Article 419. In the event of any member failing to carry out within the time specified the recommendations, if any, contained in the report of the commission of inquiry, or in the decision of the Permanent Court of International Justice, as the case may be, any other member may take against that member the measures of an economic character indicated in the report of the commission or in the decision of the Court as appropriate to the case.

Article 420. The defaulting government may at any time inform the Governing Body that it has taken the steps necessary to comply with the recommendations of the commission of inquiry or with those in the decision of the Permanent Court of International Justice, as the case may be, and may request it to apply to the Secretary-General of the League to constitute a commission of inquiry to verify its contention. In this case the provisions of Articles 412, 413, 414, 415, 417 and 418 shall apply, and if the report of the commission of inquiry or the decision of the Permanent Court of International Justice is in favor of the defaulting government, the other governments shall forthwith discontinue the measures of an economic character that they have taken against the defaulting government.

mission or with the decision of the Court. A state may then request the Governing Body of the International Labor Office to apply to the Secretary-General of the League to constitute a commission to verify the fact of compliance. The report of this commission is to be forwarded to the states concerned (in accordance with Article 415 of the Treaty of Versailles) which shall inform the Secretary-General whether they accept the recommendations contained therein, or whether they wish to refer the matter to the Court. If the report of the commission or the decision of the Court is in favor of the defaulting government the other governments shall discontinue the sanctions. It appears from these provisions that the intervention of a commission of inquiry, appointed by the Secretary-General of the League, is essential to the cessation of sanctions which the Court has indicated; although under Article 50 of the Statute the Court has ample powers to conduct its own inquiries. These provisions constitute the only instance wherein the Court is authorized by signatory states to indicate sanctions.

187. For the purpose of hearing and determining such disputes the Court Statute creates a special chamber for labor cases: The proposal that a special chamber be created for this purpose and that the International Labor Office be permitted to appear as a party before the Court was first suggested to the Advisory Committee of Jurists which, however, did not regard it with favor and refused to make any recommendation. The First Assembly, however, added to the Statute a new Article (26) which provides that all labor cases, particularly those arising under Part XIII of the Treaty, shall, whenever the parties agree to do so, be heard by a special chamber consisting of five judges. These judges are appointed by the President of the Court; they hold office for a period of three years; and may be reappointed. Two judges are also

designated to take the places of those who are unable to sit.[8] If there is a national of one party on the special chamber, the President may invite one of the judges to retire in favor of a judge chosen by the other party. In the event that neither party has a national, no provision is made for the addition of national judges. The special chamber will be assisted by technical assessors chosen for each particular case from persons nominated by each member of the League and an equivalent number nominated by the Governing Body of the International Labor Office. The Governing Body shall make up its list of assessors equally from representatives of employers and of employees, from the list referred to in the Treaty of Versailles and in corresponding articles in other Treaties of Peace. The International Labor Office is at liberty to furnish the Court with all relevant information and shall receive copies of all written proceedings.

188. Matters arising under Part XIII of the Treaty of Versailles have been submitted to the Court for interpretation: These include three disputes arising: (1) Under Article 389, relating to the method of nominating delegates; (2) under Article 396, relating to the meaning of the term industrial life and labor; and (3) a supplemental question arising under Articles 396 and 405.

189. Direct access to the Court for purposes of a judgment may become indirect access for purposes of advice: Although Part XIII confers obligatory jurisdiction upon the Court, in the three instances noted the advisory competence of the Court was invoked. In the first instance, concerning

[8] The first special labor chamber comprised: Lord Finlay (Great Britain), president, M. de Bustamente (Cuba), M. Altamira (Spain), M. Anzilotti (Italy) and M. Huber (Switzerland), with M. Nyholm and Mr. Moore as substitutes. All have been reappointed for the period from January 1, 1925 to December 31, 1927.

the seating of the Netherlands Delegate to the Third International Labor Conference, under Article 389, the General Conference recommended that the Governing Body request the Council to give an opinion upon the question whether delegates nominated by a state should represent the largest trades union or trades unions which together had the largest membership.[9] Because of the reluctance of the Netherlands to appear as a party its delegate having already been seated, the question was submitted as theoretical.[10] But through an error, the question submitted by the Council to the Court related specifically to the seating of the Netherlands delegate, and that state appeared in actuality as a defendant, though technically not such. The case is important in establishing the precedent that whenever states do not wish to appear as parties, as contemplated by the Treaty, they may seek an advisory opinion through the Council. The creation of this precedent establishes the principle that obligatory jurisdiction is in reality optional; that is, the parties or a party may apply to the Council for an opinion, thus avoiding a judgment by the Court. In this manner, the control of the Council over the settlement of disputes may be extended to cover agreements entered into by states to confer jurisdiction upon the Court; and direct access to the Court for purposes of judicial decision may be at any time converted into advisory jurisdiction. It is, therefore, possible to exaggerate the importance of the obligatory character of the jurisdiction in view of its convertible quality.

[9] Text of paragraph 3 of Article 389 of the Treaty of Versailles follows:

> The members undertake to nominate non-government Delegates and advisers chosen in agreement with the industrial organizations, if such organizations exist, which are most representative of employers or work-people, as the case may be, in their respective countries.

[10] For account of the controversy, see Annex I.

190. Injunctions against free discussion and research may be sought through advisory opinions: Such an issue arose under Article 396 of the Treaty of Versailles and concerned the interpretation of the meaning of the words "conditions of industrial life and labor."[11] The issue was raised by the inclusion on the agenda of the Labor Conference of an item referring to the eight-hour day for agricultural workers. France opposed the discussion of this item on the ground that agricultural labor was not comprehended within the term "industrial life and labor." This controversy involved an interpretation of the Treaty, being precisely the kind of question contemplated for submission under Article 423 to the Court for a decision by the chamber for labor. But the drafters of the labor clauses of the Treaty had not foreseen that members of the League would undertake to restrict instead of develop the activities of the International Labor Office and that instead of appearing as the prosecutor of defaulting states, the Director would be given the rôle of defendant. The Assembly, having refused to permit the International Labor Office or its Director to appear as a party before the Court, that body could not now be summoned as a defendant party. But the authority of the Council to request advisory opinions offered a solution and France made its complaint not to the Court but to the Council. The submission of the matter for an advisory opinion was opposed by the Director of the International Labor Office on the ground that the Governing

[11] Paragraph 1 of Article 396 provides: "The functions of the International Labour Office shall include the collection and distribution of information on all subjects relating to the international adjustment of conditions of industrial life and labour, and particularly the examination of subjects which it is proposed to bring before the Conference with a view to the conclusion of international conventions, and the conduct of such special investigations as may be ordered by the Conference."

Body on which France had a member was fully competent to deal with the matter but that Body had not been consulted. The Council submitted the question in disregard of the opposition. Before the Court rendered an opinion, France requested the Council to submit a supplemental question, namely, whether the examination of proposals for the organization and development of methods of agricultural production and of other questions of a like character, were within the competence of the International Labor Office. The submission of the question was opposed by the Director on the ground that no such competence was claimed and no cause for misunderstanding existed. On the same day the Court rendered opinions in both instances to the effect that (1) the International Labor Organization was authorized to include agricultural labor and (2) the organization was not authorized to carry on agricultural research. The importance of these two controversies and their settlement arises from the principles which they establish. (1) The interpretation of the Treaty may be determined by advisory opinion as between a state and the International Labor Organization by reason of the fact that the latter may not appear as a party; but as between states which may appear as parties the decision is to be taken in the form of a judgment. (2) The advisory character of the proceeding may take on an obligatory character with respect to the right of the Council, for matters affecting the International Labor Office were submitted against its will. (3) The limits of the matter to be submitted to the Court will be defined by one of the interested parties without the approval of the body whose interests are affected, and it may be so framed that the Court has little or no discretion but to render the kind of advice sought. (4) An injunction may be sought and obtained against labor research through the instrumentality of advisory opinions rendered upon request of a political body.

191. Intervention by the Council renders useless the special chamber for labor cases: Under the Statute this chamber is composed of five judges; but under Article 71 of the Rules of the Court all advisory opinions must be rendered by the full Court. Until the rule is changed, no matter concerning labor submitted by the Council can be brought before the special chamber. It would seem, therefore, that the right of the Council to request advisory opinions on labor matters will render useless the machinery recommended by the International Labor Office, together with the guarantees of technical assessors and the right of that office to submit all relevant information.

192. The question whether the adherence to the Court would prejudice the position of American labor is debatable: In the United States, the issuance of an injunction by a Court in labor disputes is not regarded in a friendly light by organized labor. That such injunctions may be issued by way of advice upon questions framed without the consent or cooperation of labor representatives and under a form of obligatory jurisdiction arising from the Treaty of Versailles, cannot but give rise to apprehension in principle although not immediately applicable in practice to the United States. The fact that an international court may be called upon to interpret Article 405 with respect to what constitutes lessening protection afforded to workers within a state, or with respect to the manner in which a national act adopted in pursuance of an international convention is being carried out, comes near to interference in domestic labor matters. And while it may be said that such questions cannot affect American labor unless the United States becomes a member of the International Labor Organization, it should not be forgotten that adherence to the Court is but adherence to the League System, and as

such the commitment should be examined beyond its immediate bounds. This apprehension is reflected in the action taken by the American Federation of Labor at its forty-fifth annual session held in Atlantic City in October, 1925. On October 16th, a resolution was adopted to the following effect: "Your committee has considered that part of the Executive Council's report under the caption of "International World Court," page 54, and Resolution No. 40, and begs leave to report on these proposals as follows: 'Conditions affecting the relations between the nations of the world are in a great state of flux. In this changing order of things of world-wide nature it is imperative that extreme caution and care be exercised in whatever decisions are reached and which are world-wide in their consequences. Because of this and for the further reason that the American Federation of Labor has viewed sympathetically the development of a tribunal which may lessen causes of war and promote peace among the peoples in the world without involving our nation in foreign entanglements and alliances, your committee recommends reference of the subject contained in Resolution No. 40 to the Executive Council for continued research, observation, study and constant alertness and in addition to a report of its findings on this subject.'" The position here taken is a reversal of the action taken by the American Federation of Labor at previous meetings when the Court had been endorsed. It indicates a more thoughtful consideration of the question of the affiliation of the United States with the Court.

CHAPTER XIII

JURISDICTION CONCERNING TRANSIT AND COMMUNICATIONS

193. Part XII of the Treaty of Versailles and the corresponding parts of the other Treaties, dealing with ports, waterways and railways confers a limited amount of jurisdiction on the Court: The jurisdiction conferred is of two orders: (1) Through intermediary of the League of Nations: and (2) obligatory. Instances of jurisdiction through the intermediary of the League are Articles 336 and 376 of the Treaty of Versailles relating respectively to a provisional régime of international waterways and to the interpretation of Part XII of the Treaty of Versailles; and an instance of obligatory jurisdiction is Article 386 of the Treaty of Versailles, relating to the Kiel Canal.

194. Jurisdiction with respect to international rivers was conferred on the Court provisionally by Article 336 of the Treaty of Versailles: The rivers Elbe, Oder, Niemen and Danube are declared to be international under the Versailles Treaty and are placed under the administration of international commissions whose members are representatives of riparian states and either representatives of two or more of the Allied Powers or of states specified by the League of Nations. Under Article 336 any state represented on an international commission

[1] The Treaty of Versailles is here specifically dealt with but it should be remembered that identical or very similar clauses apply to Austria, Hungary and Bulgaria.

is authorized to appeal to the tribunal instituted by the League[2] whenever a riparian state does not fulfil its international obligations. Under Article 338 of the Treaty the above régime for international waterways was to be superseded, however, by a general convention drawn up by the Allied Powers and approved by the League. The jurisdiction of the Court with respect to international rivers, therefore, is not governed by Article 336 of the Versailles Treaty but by the régime approved by the League and hereafter described.

195. Jurisdiction with respect to the general interpretation of Part XII of the Versailles Treaty was not specifically conferred on the Court by the Treaty: Article 376 merely provides that disputes concerning the interpretation and application of Part XII of the Treaty shall be settled as provided by the League of Nations; the jurisdiction of the Court in such matters is governed by the provisions made for this purpose by the League.

196. The framing of the final provisions with respect to Articles 338 and 376 of the Versailles Treaty was part of a general task laid on the League by the Covenant: Article 23 (e) of the Covenant provides that the League "will make provision to secure and maintain freedom of communications and of transit and equitable treatment for the commerce of all members of the League." In accordance therewith, the Council of the League, at its meeting in February, 1920, appointed a commission of inquiry on the freedom of communication and transit to submit proposals regarding a permanent organization to deal with these subjects. This commission duly reported, and its proposals, as adopted by the Council, were submitted to the Second Committee (on Technical Organizations) of the First Assembly.

[2] This expression is defined by Article 37 of the Court Statute, to mean the Court.

197. The First Assembly undertook to summon a general conference on Freedom of Communication and Transit: The program for this Conference was as follows: (1) To draw up measures to be taken for the fulfillment of provisions concerning freedom of transit contained in the Peace Treaties and in general conventions; and (2) to organize an Advisory and Technical Committee with the following duties: (a) to consider and propose measures calculated to ensure freedom of communication and transit; (b) to assist the Council and Assembly in the duties entrusted to them by various Articles of the Treaty of Versailles; (c) to arrange for any future conferences and their agenda; (d) to exchange all necessary information with the technical ministries of members of the League; and (e) to investigate any disputes which would be referred to the League under Articles 336, 376, and 386 of the Treaty of Versailles and corresponding Articles of other Treaties. For the settlement of such disputes, the Assembly provided that the Committee was to endeavor to adjust them by conciliation between the parties and only upon failure of such proceedings were such matters to be brought before the Court. The foregoing program included, therefore, powers conferred upon the League by the Treaties and by the Covenant, and in recommending a procedure for the settlement of disputes, made no differentiation between general clauses of the Treaty, and clauses specifying the use of the Court.

198. The first General Conference on Freedom of Communication and Transit, held at Barcelona in March, 1921, and the second General Conference, held at Geneva, in November, 1923, extended the jurisdiction of the Court: Various conventions and statutes drawn up and adopted at these Conferences confer duties on the Court with regard to their interpretation; such are The Statute on Freedom of

Transit and the Statute on the Régime of Navigable Waterways of International Concern drawn up at the Barcelona Conference and the Statutes on the International Régime of Railways and on the International Régime of Maritime Ports, framed at the Conference of Geneva.

199. **The jurisdiction conferred by the Barcelona and Geneva Conventions constitutes the Court one of appeal and recourse optional:** The conventions concluded at Barcelona elaborate the method of settlement of disputes suggested by the First Assembly. They provide, that any dispute as to the interpretation and application of these statutes which cannot be settled by the parties themselves is to be brought before the Court, unless steps are taken for settlement by arbitration or by some other means under a special agreement or a general arbitration provision. Precedence is given, however, to another step, for the contracting parties agree to submit their disputes first to "any body established by the League of Nations as the advisory and technical organization of the members of the League in matters of communication and transit," and this submission is to take place "without prejudice to the powers and right of action of the Council and of the Assembly." [3] It appears, therefore, under these provisions that the first right of action is that of the Council or Assembly, the second step may be taken by the Advisory and Technical Committee, while third in importance are special agreements or arbitral provisions and only if (1) the Council or Assembly waive their right of action; (2) or the Advisory and Technical Committee fail; or (3) there exists no special agreement or arbitral convention between the parties, may a dispute be submitted to the Court. The conventions, drawn up at Geneva regarding railways and ports, provide that if a

[3] Article 13, Statute on Freedom of Transit; Article 22, Statute on the Régime of Navigable Waterways of International Concern.

dispute between the parties cannot be settled amicably, the matter will be submitted to the Advisory and Technical Organization of the League, and if this body is unsuccessful the question will be submitted to an arbitral tribunal unless the parties "have decided, or shall decide, under an agreement between them to bring it before the Permanent Court of International Justice." [4]

200. Recourse to the Court is obligatory in one instance under the Geneva conventions: The arbitral tribunal, at the request of one of the parties, may pronounce the solution of a question involving international law to be a necessary preliminary to the settlement of the dispute. In such instances the jurisdiction of the Court is obligatory, however, only for the legal question preliminary to the settlement of the dispute on its merits.

201. The provisions authorized by the League with respect to communication and transit, have been applied in one instance: A dispute arose in 1922 between the Governing Commission of the Saar Basin and the German Government concerning the application of the Berne Convention of 1890 to the Saar Railway System. The matter was referred by the Advisory and Technical Committee for Communication and Transit, to a Commission of Inquiry. The Commission "decided to leave out of account the legal arguments as to principles put forward by both sides and to endeavor to solve the difficulties from a practical and technical point of view." [5] It, therefore, drafted an agreement between the parties and this, having been approved by the Advisory and Technical

[4] Article 31, Statute on the International Régime of Railways; Article 21, Statute on the International Régime of Maritime Ports.

[5] *First Report of the Advisory and Technical Committee for Communication and Transit,* July 24th, 1923, p. 3.

Committee, was ratified by both the German Government and the Governing Commission of the Saar Territory.

202. The Court has obligatory jurisdiction under certain transit clauses of the Treaties of Versailles, St. Germain and Trianon: Articles 380–386 of the Treaty of Versailles provide for the international use of the Kiel Canal and refer any dispute as to their interpretation to the "jurisdiction instituted for the purpose by the League of Nations." Article 37 of the Statute states that the Court will be such tribunal. Articles 327 of the Treaty of St. Germain and 310 of the Treaty of Trianon specifically refer to the Permanent Court of International Justice.[6] In such an instance the procedure prescribed by the Barcelona and Geneva conventions does not apply, for the parties are not bound to resort to the Permanent Advisory and Technical Committee of the League but may apply to the Court for a decision.

203. One appeal has been made to the Court under Article 386 of the Treaty of Versailles: This case concerned the passage of the S. S. "Wimbledon" through the Kiel Canal. The S. S. "Wimbledon" was a British steamship chartered by a French armament firm and was engaged in the transport of war material to the port of Danzig for the use of Poland. The Polish-Russian war was not concluded at this period (March, 1921); therefore the German authorities refused the ship passage through the Kiel Canal on the ground that the neutrality of Germany would be violated were it to permit the transit, through German territory of war material for the use of a country engaged in war. This refusal was considered a violation of Article 380 of the Treaty of Versailles and a complaint was made to this effect by the Governments of Great Britain, France, Italy and Japan, requesting a judgment of

[6] See Chapter VIII.

the Court, France claiming compensation for the loss suffered.[7] The decision of the Court was rendered in favor of the Allied Powers.[8]

204. The Court possesses a two-fold jurisdiction in matters of transit and communication: One function of the Court is that of a Court of appeal under the procedure established by the conventions of Barcelona and Geneva; a second function is that of a Court of first instance under those clauses of the Treaties that specifically so provide. In the former instance, recourse to the Court is optional since any arbitral tribunal may be substituted for it; in the latter instance recourse to the Court is obligatory. Under the former procedure, if the one case dealt with thereunder may be regarded as a precedent, legal arguments are disregarded and the settlement of the matter depends upon several bodies, being referred from one to the other for enquiry and approval; under the latter procedure the settlement is based on legal arguments, it is rapid and effective, providing for the interpretation of the disputed clause and for adequate compensation.

205. The adoption of special provisions in the Statute to deal with questions of transit was due to a British proposal: The Committee of Jurists in preparing the Statute made no recommendation for a special chamber. The insertion of provisions establishing a special chamber to deal with questions of communication and transit, as provided by Article 27 of the Court Statute is due to a British amendment submitted to the Third Committee of the First Assembly. The reason for this

[7] Article 380 follows:

The Kiel Canal and its approaches shall be maintained free and open to the vessels of commerce and of war of all nations at peace with Germany on terms of entire equality.

[8] For narrative, see Annex I.

amendment, as stated by the delegates of Great Britain, was that the disputes in question had a technical character, and a special chamber having been constituted to deal with labor cases—"it would be unreasonable not to extend the principle adopted in labor questions to the other technical questions."[9] During the discussions it was pointed out that the Second Committee of the Assembly was making provisions for the appointment of a body to deal with the technical questions and that questions coming before the Court would have previously been before such experts, thereby diminishing the technical character of the questions submitted. But the insistence of the British representative, Sir Cecil Hurst, supported by the representative of South Africa, Viscount Cecil, prevailed and the Article was adopted.[10]

206. Article 27 of the Court Statute provides a special chamber for transit and communications: As adopted, it provides that a special chamber of five judges shall be selected by the Court every three years for the purpose of hearing and determining cases relating to transit and communication, particularly those referred to in Part XII of the Treaty of Versailles and the corresponding portion of other treaties.[11] The regulations governing national judges and the assistance of

[9] *Records of the First Assembly, Committees,* Vol. I, p. 398.

[10] The only really apparent reason for the constitution of the chamber on transit seems to be contained in an observation of M. Fernandez to the effect that "it was desirable to put the procedure in labour and transit questions on an equal footing, in order to avoid creating the impression that the establishment of a special chamber for the first was a concession to class interests." (*Records of the First Assembly Committees,* Vol. I, p. 399.)

[11] The first members of the special chamber were: M. Weiss (President); M. Barbosa, M. Nyholm, Mr. Moore and M. Oda; with M. Anzilotti and M. Huber as substitutes. The present members are the same with the exception of M. Pessoa elected in the place of M. Barbosa.

assessors are similar to those contained in Article 26 of the Statute concerning labor cases. No use has been made, as yet, of this chamber. In the case of the Kiel Canal, the only matter thus far submitted to the Court under Part XII of the Treaty of Versailles, neither party requested reference to this chamber, presumably because the question involved a principle of international law concerning the neutrality of international waterways, and was not a technical problem which would have necessitated the presence of assessors.

207. **The special transit chamber of the Court appears to duplicate the Advisory and Technical Committee of the League:** Both bodies are constituted for the purpose of dealing with cases relating to transit and communications, particularly those arising under Part XII of the Versailles Treaty. Technical assessors in the chamber are to furnish the expert knowledge possessed by the Advisory and Technical Committee of the League. Submission of the majority of transit disputes to the Committee is, however, obligatory under the provisions of the various conventions while submission to the special chamber of the Court is nowhere specifically provided for. In view of these circumstances, it appears probable that the Advisory and Technical Committee will be the body responsible for the settlement of disputes with relation to transit.

CHAPTER XIV

JURISDICTION OVER DOMESTIC QUESTIONS

208. The determination of what constitutes a domestic question is ordinarily regarded as the exercise of a sovereign right: States regard as domestic any matter, the execution of which takes place within their own territory and which has not been made the subject of an international agreement. The exercise of the sovereignty of a state, in its strictest sense, enables a nation to determine upon what conditions it will have intercourse with other nations. On this principle such matters as the tariff, immigration, labor, and coastwise traffic, come within the meaning of domestic affairs.

209. Members of the League have assigned to the Council the authority to determine when a controversy is of a domestic nature: The Covenant provides that the Council may consider any matter which threatens war, when called to its attention by a member of the League; or any question which is suitable for arbitration, when submitted by the parties; or any matter submitted by one party for inquiry. If, however, under such circumstances, one of the parties alleges the question to be domestic, the Council will determine the fact, and upon finding it to be such it may make no recommendation for a settlement. This provision transfers from members of the League to the Council the right to determine the nature of their internal affairs when they are called into question by a controversy over which the Council takes jurisdiction.[1]

[1] The reluctance of the United States Government to abandon any part of its right to determine what constitutes a domestic question in-

210. The Covenant undertakes to confer upon the Council a similar right with respect to non-members of the League: Article 17 provides whenever a dispute arises between a member of the League and a non-member or between two non-members, such states shall be invited to accept the provisions of Articles 12–16 of the Covenant for the purposes of settlement of the dispute upon conditions to be determined by the Council. Failure to accept the invitation and subsequent resort to war makes a non-member liable to the application of sanctions; or, short of war, the Council may make recommendations to prevent hostilities. In the event that a non-member state accepted the invitation and raised the question whether the dispute

duced Senator Lodge to propose the following reservation on Nov. 19th, 1919, when the question of ratifying the Peace Treaties was before the Senate:

> The United States reserves to itself exclusively the right to decide what questions are within its domestic jurisdiction and declares that all domestic and political questions relating wholly or in part to its internal affairs, including immigration, labor, coastwise traffic, the tariff, commerce, the suppression of traffic in women and children and in opium and other dangerous drugs, and all other domestic questions, and solely within the jurisdiction of the United States are not under this treaty to be submitted in any way either to arbitration or to the consideration of the Council or of the Assembly of the League of Nations, or any agency thereof, or to the decision or recommendation of any other power.

Senator Knox, during the course of the debate, defined domestic questions to include:

> "Our conservation policy, our immigration policy, our right to expel aliens, our right to repel invasion, our right to maintain military and naval establishments, or coaling stations within our own borders or elsewhere, as the development and protection of this country might demand, our right to make necessary fortification of the Panama Canal, or on our frontiers, our right to discriminate between natives and foreigners in respect to rights or property and citizenship and other matters of like character." Address before the Senate on March 1st, 1919.

was international, the Council would decide the matter. In the event that a state refused the invitation, the Council could proceed as though the matter were international or it might, of its own volition, request an opinion from the Court. An instance occurred wherein the Council assumed a dispute to be international and proceeded without the consent of the State, namely, in the matter of the status of Eastern Carelia.

211. Any domestic question may be submitted to the Court for an advisory opinion: Article 14 of the Covenant limits the cases to be submitted to the Court to those of an international character. The Advisory Committee of Jurists limited questions in a like manner but the revision of the draft Scheme by the Assembly removed the limitation. It appears, however, that any party may raise the question whether the issue is international whenever it affects an actual controversy arising under Articles 11, 12, 13, 15 or 17 of the Covenant and in such case the Council is bound under par. 8 of Article 15 to determine the fact. The Council may take its decision upon any ground it sees fit; and it may determine the fact itself, or refer it to the Court or to a special committee of jurists. When the matter is referred to the Court, it is possible that the Court, upon complaint of a party, may examine the question whether the decision taken by the Council was in accordance with existing rules of law or with the established procedure, or it may decline to do so. In the matter of the German settlers, Poland contended before the Court that the matter had not been brought to the attention of the Court in the manner prescribed by the rules adopted by the Council for the conduct of minority complaints. In that instance, the Court was of the opinion that the Council had complied with the proper procedure and that the Court would not inquire too closely into the matter. On the other hand, the Council was proceeding under Article 14 of the Covenant in submitting the matter of the status of

Eastern Carelia but the Court held that an existing rule of law supervened over the provision contained in Article 17 of the Covenant which undertook to apply the Covenant to non-signatory states. But, again, the Council may assume that the question is theoretical and does not relate to any existing controversy in which case it will not be possible to raise the question of its character and the Council may proceed to submit a question dealing with domestic affairs. In this manner it would be possible to establish definite international rules concerning immigration, by submitting a question concerning the agenda which the International Labor Office is now preparing on immigration.[2] Conventions based upon such principles when ratified would constitute international law for all states accepting the convention and by weight of opinion would direct the international policy. An adherent to the Court Statute, not a member of the League, and not in sympathy with the international regulation of immigration would thus find itself in the position wherein its Court would be interpreting and facilitating the application of a convention which the government of the adherent had refused to ratify on the ground that it considered the matter of immigrant inspection and regulation to be a domestic matter. Nor should the fact be overlooked that every convention emanating from the International Labor Conference brings that subject within the provisions of the terms of the Treaty of Versailles. And, lastly, while states may not request advice directly, they may do so through the Council. Should France so desire it may request the Council to obtain from the

[2] It has been announced that the next session of the International Labor Conference will take up the question of dealing with the inspection of immigrants on board ship, with the view to drafting a convention for its regulation; and also the codification of rules relating to seamen's articles of agreement and the general principles underlying the inspection of working conditions of seamen. (*N. Y. World*, October 4th, 1925.)

Court an advisory opinion upon its competence to pay its debts and at what rate, without respect to any particular state. The Court, under Article 50 of the Statute may appoint a commission of inquiry and communicate its findings to the Council. These judicial findings could then be offered as a basis for negotiation which other states would find difficulty in opposing but without having had the opportunity to intervene as interested parties, and present information and arguments by competent counsel.

212. **The principles which will guide the Court in determining whether a matter is domestic or international have not been ascertained:** The rules which will guide the Court are wholly discretionary. Where the matter alleged to be domestic is a matter of stipulation in treaties, the Court will have no difficulty in finding a rule of law, as it did in the matter of the Nationality Decrees in Tunis and Morocco. When the matter involves questions of immigration, tariff, labor and similar questions which are not the subject of international agreement, the rule to be applied is less assured. It is for this reason, together with the fact that matters considered to be domestic by some states may nevertheless be referred for an advisory opinion, that it is believed there should be a firm foundation of law under a Court whose jurisdiction is now practically unlimited as to the subject matter within its advisory competence.[3]

[3] Senator Lodge in his proposal to separate the Court from the League in Senate Resolution No. 122 (1924), evidently had this situation in mind when he attached to that project the following additional Article:

Article LXV.—The Court shall not have jurisdiction to render advisory opinions on any question which affects the admission of aliens into the United States, or the admission of aliens to the educational institutions of the several states, or the territorial integrity of the several states of the United States or concerning the

213. The Geneva Protocol undertook to change the existing rule under the Covenant: Article 5 of the proposed Protocol provided that the provisions of paragraph 8 of Article 15 of the Covenant shall continue to apply.[4] But Article 4 provided for a system of compulsory arbitration to be conducted by the Council through committees of arbitration; and these committees were, upon the assertion of one of the parties that the dispute is domestic, to request the opinion of the Court through the Council. The opinion by the Court was to be binding and if the dispute was thus found to be domestic no recommendation was to be made other than to make a statement to that effect. This provision was in accordance with the terms of the Covenant; for when the Council finds a matter to be domestic it may make no award; therefore, logically, its committees may make no award when the Court finds a dispute to be of a domestic nature. Such was the situation when the Japanese delegation pointed out that whenever a question was found to be domestic the system of obligatory jurisdiction

question of the alleged indebtedness or money obligations of any state or the United States, or any question which depends upon or involves the maintenance of the traditional attitude of the United States concerning American question, commonly described as the Monroe Doctrine, or other purely Government policy or any question which is considered by the Government of the United States to be a domestic question.

[4] The text of Article 5 as originally drafted, follows:

The provisions of paragraph 8 of Article 15 of the Covenant shall continue to apply in proceedings before the Council.

If in the course of an arbitration, such as is contemplated in Article 4 above, one of the parties claims that the dispute, or part thereof, arises out of a matter which by international law is solely within the domestic jurisdiction of that party, the arbitrators shall on this point take the advice of the Permanent Court of International Justice through the medium of the Council. The opinion of the Court shall be binding upon the arbitrators, who, if the opinion is affirmative, shall confine themselves to so declaring in their award.

ceased to apply, and that under Article 5 and under Article 10, relating to penalties, no means had been provided for the settlement of a dispute which was declared to be domestic, but were the parties to resort to war, one or both states would be declared to be presumptive aggressors and liable to the application of sanctions. It was the opinion of the Japanese representative that unless there were deleted from subdivision 1 of paragraph 3 of Article 10, the following words:[5] "Or has disregarded a unanimous report of the Council, a judicial sentence or an arbitral award recognizing that the dispute between it and the other belligerent state arising out of a matter which by international law is solely within the domestic jurisdiction of the latter state," a nation resorting to war might become a presumptive aggressor. The Japanese proposal, therefore, was: (1) Either to include domestic questions within the arbitral system; or (2) to permit states to settle them by war without incurring the risk of becoming presumptive aggressors and thus liable to military sanctions. The Japanese proposal prevailed:

[5] Subdivision I before amendment follows:

Every state which resorts to war in violation of the undertakings contained in the Covenant or in the present Protocol is an aggressor. Violation of the rules laid down for a demilitarized zone shall be held equivalent to resort to war.

In the event of hostilities having broken out, any state shall be presumed to be an aggressor, unless a decision of the Council, which must be taken unanimously, shall otherwise declare:

1. If it has refused to submit the dispute to the procedure of pacific settlement provided by Articles 13 and 15 of the Covenant as amplified by the present Protocol, or to comply with a judicial sentence or arbitral award or with a unanimous recommendation of the Council or has disregarded a unanimous report of the Council, a judicial sentence or an arbitral award recognizing that the dispute between it and the other belligerent state arises out of a matter which by international law is solely within the domestic jurisdiction of the latter state;

and there was added to subdivision 1, paragraph 3 of Article 10, the following sentence:

> Nevertheless, in the last case [domestic questions] the State shall only be presumed to be an aggressor if it has not previously submitted the question to the Council or the Assembly, in accordance with Article II of the Covenant.

There was also added to Article 5 a concluding paragraph as follows:

> If the question is held by the Court or by the Council to be a matter solely within the domestic jurisdiction of the state, this decision shall not prevent consideration of the situation by the Council or by the Assembly under Article II of the Covenant.

214. The precise meaning of the proposal has been the subject of varying interpretations: There is not, and probably will not be, an authoritative legal interpretation; therefore each interpreter may take the view which seems to him most sound in reason and practical in application. It appears that under Article 15 of the Covenant whenever the Council finds a matter to be domestic it may take no action, not even making a recommendation. The matter then returns to the states for their adjudication through diplomacy or war as they may determine. When the Council refers the matter to the Court and it finds the question to be domestic, the Council presumably will follow the advice of the Court and take no action under Article 15 of the Covenant; for the clear intention of Article 15 is to exclude domestic questions from the competence of the Council. But under the proposed Protocol, instead of the question being returned to the parties, one party may allege that there is a threat of war or a situation which endangers good understanding and reopen the matter under Article 11 of the Covenant. The Council may then reconsider the matter. It is said that the Council may only *consider* the matter and un-

less both parties consent it may not make a recommendation. This contention is unimportant for the reason that under the Protocol, whether a state accepts or declines to accept the reference to Article 11 if it proceeds to war it becomes automatically guilty of being an aggressor and liable to sanctions. Under the Covenant, the state has the right in domestic questions to settle them as it sees fit without interference from the Council, including war, if necessary; under the Protocol it would lose this right and all protection against sanctions taken by other members of the League. This being true, under the Protocol the state would lose the right to settle a dispute involving its alleged domestic affairs, except through the intervention of the Council, whenever diplomatic negotiations failed.

215. **The provisions of the Geneva Protocol were intended to apply to non-members of the League:** Article 16 of the Protocol extended its application to all controversies between a member and non-member of the League, but not to disputes arising between two non-members. Under such circumstances, the Council could have invited the non-member to accept the provisions of Article 17 of the Covenant, making applicable Articles 12–16, as exemplified in the Protocol. If such state had declined, the sanctions contained in Article 16 of the Covenant, as defined in the Protocol, would become applicable. This provision would have extended the provisions of the Japanese amendment to non-member states whenever a member of the League set in motion the machinery for the inclusion of such states in an inquiry and whenever the Council undertook to carry it out.[6] Under such circumstances, whenever the Court

[6] It is generally believed that the Japanese had immigration in mind, but whether or not such was the case, immigration, tariff, foreign debts, customs or any other question which threatened a rupture would come within the provisions adopted and would include non-members of the League if the other party were a member.

was requested to give an advisory opinion to a committee of arbitration, its opinion would become involved in the procedure by which the Council would eventually re-establish its competence over a domestic question.

216. The position of a state adhering to the Statute but remaining aloof from the organization which determines the policies of the Court calls for additional safeguards: It appears that such a state would assume a responsibility in having its Court participate in such decisions but it would have no voice in determining the policy of which they form a part. It is a serious question of international policy whether a great court of justice and eminent judges should be made the advisers to temporary committees of arbitration and whether their opinion should be declared to be mandatory upon a sub-committee and not binding upon the Council. It is not enough to guard against future similar contingencies by reserving domestic questions from consideration by the Council, or from their submission to the Court for an advisory opinion; but the Congress or Parliaments should, in a reservation, define domestic issues in order that the interpretation may rest with Congress or Parliaments and not with the Council. And it may be found desirable to stipulate that whenever a question arises concerning whether a dispute is of a domestic or international nature, affecting any country, the Court shall reach its decision through a judgment and not through an advisory opinion, in order that the judicial determination shall be final and not subject subsequently to political manœuvering.

CHAPTER XV

COMPETENCE WITH RESPECT TO WAR

217. The general prevention of war is vested in the League of Nations by virtue of the Covenant, and the partial prevention of war is vested in treaties of mutual guarantee: The competence to prevent war is vested in the League under the terms of a general treaty, namely the Covenant. Under this Covenant *all* members of the League are bound to prevent war, or preserve peace; they are responsible to the Assembly and Council and take action as indicated by these bodies. The application of the terms of the Covenant having proved difficult in general, the League has approved of partial treaties and regional agreements and made an effort (in the Treaty of Mutual Guarantee) to place such agreements under the guidance of the Council. States are, however, free to form combinations for their own protection, and they have concluded treaties without any reference to or responsibility under the League.

218. The general authorization to deal with threats of war is granted to the League under the Covenant: When acts of war have taken place it is ordinarily too late to consider peaceful methods of settlement. For this reason, the Covenant deals, in the first instance, with threats of war. Article 10 establishes the principle that the territorial integrity and existing political independence of all members of the League shall be maintained and that, in the event of any aggression or threat of aggression, the Council shall advise upon the means by which

such integrity shall be preserved. Article 11 provides that threats of war, whether affecting members of the League or not, shall be the concern of the whole League and it may take any action that may be deemed wise and effectual to preserve peace. But in order to take such action there must first be a complaint and it is, therefore, provided that any member of the League may bring to the attention of the Assembly or Council any circumstance which, in its judgment, threatens peace. This complaint is to be regarded as a friendly act. The Secretary-General, on receipt of the complaint, is authorized to call a meeting for the purpose of having the Council make a recommendation to the League.

219. **Sixteen disputes have been called to the attention of the Council under Article 11:** These disputes included the following:[1] (1) Between Persia and Russia over the bombardment of the port of Enzeli, in 1920, wherein an act of force precipitated the appeal by Persia. The Council took no action and the parties settled the controversy. (2) Between Finland and Sweden over the Aaland Islands, in 1921, wherein no threat of war appears to have been involved but Great Britain exercised its friendly right to bring the matter to the attention of the Council which settled the controversy. (3) Between Albania and Jugoslavia over the Albanian frontier, in 1921, wherein war had already been in progress when Albania made its various appeals and the Conference of Ambassadors settled the controversy by establishing a frontier. (4) Between France and Great Britain over the Upper Silesian plebiscite in 1921, submitted by the Supreme Council, wherein no threat of war existed but the Council recommended a boundary line to the Conference of Ambassadors, which this body accepted. (5) Between Austria and Hungary over the Burgenland,

[1] For narrative of these controversies and their settlement, see *Security Against War,* Vols. I and II.

wherein fighting was in progress between the two countries at the time of the Austrian appeal, and the Conference of Ambassadors settled the dispute, as one involving a boundary. (6) Between Finland and Russia over Eastern Carelia in 1922, submitted by Finland, wherein a threat of war may have been involved and which remains unsettled by reason of the refusal of the Court to render an opinion and of the impotence of the Council to proceed against a non-member state. (7) Between Bulgaria and states bordering on Bulgaria, in 1921, wherein Bulgaria alleged a threat of war, but since the other states denied the allegation, no action was taken by the Council. (8) Between Hungary and Roumania over the position of Hungarian optants in Roumania wherein no threat of war was alleged, but wherein the Council has taken no effective action. (9) Between Bulgaria and Greece, in 1923, over the position of Bulgarians in Western Thrace, wherein a threat of war was incipient and which question was not satisfactorily settled by the Council. (10) Between Lithuania and the Allied Powers, in 1923, where the Memel Territory was captured by Lithuania before the Allied Powers requested the Council to settle the controversy. (11) Between Great Britain and Turkey over Iraq, submitted in 1923, and withdrawn. (12) Between Poland and Czechoslovakia over the boundary of Jaworzina in 1923, submitted by the Conference of Ambassadors, wherein a threat of war was incipient, involving the question whether the decision of the Conference delimiting the boundary had been final, and wherein the Court rendered an advisory opinion confirming this position. (13) Between Albania and Jugoslavia, submitted by the Conference of Ambassadors in 1924, concerning the boundary at the Monastery of Saint Naoum, wherein a threat of war may have been incipient and wherein the settlement of the dispute by the Conference of Ambassadors was determined to be final through an advisory opinion by the Court. (14) Between Greece and Turkey concerning the ex-

change of populations; submitted by Greece, in 1924, and settled in accordance with an advisory opinion of the Court. (15) Between Greece and Turkey concerning the expulsion of the Oecumenical Patriarch; submitted, in 1925, by Greece, for an advisory opinion through the Council and withdrawn. (16) Between Greece and Bulgaria over the alleged violation of the frontiers of each state by troops of the other, appealed by Bulgaria in October, 1925, wherein war appears to have been resorted to as an outcome of the failure to settle the former disputes referred by Bulgaria to the Council. From the foregoing record it is apparent that but few disputes involving a threat of war have been submitted and where such appears to be the unquestioned fact, namely between Persia and Russia, Albania and Jugoslavia, Finland and Russia, Bulgaria and neighboring states, or Memel and the Allied Powers, either the dispute was not settled by the Council under the terms of Article 11 or there was a resort to force which determined the nature of the settlement.[2]

220. Disputes involving threats of war have not been submitted to the Council through invoking the powers of the Council under Article 11 of the Covenant: These have for the most part taken place between a member and a non-member of the League. Instances include (1) The Polish-Russian war of 1921 where France intervened independently. (2) The Greco-Turkish war wherein the Allied Powers were active in the settlement. (3) The Polish-Lithuanian war over Vilna wherein the Council failed to make a settlement. (4) The conquest of Eastern Galicia by Poland wherein both Coun-

[2] An exception appears to be afforded in the recent Greco-Bulgarian crisis. In this instance the Council met without delay, delivered an ultimatum and intimated that military forces were available, if within sixty hours the Greek troops had not evacuated the occupied territory. This action appears to be a logical continuation of the traditional pre-war attitude of the Great Powers toward Balkan incidents.

cil and Conference failed to act. (5) The invasion of Memel by Lithuanian irregulars wherein the Council confirmed the rights of conquest. (6) The occupation of Fiume, wherein Italy, a self-interested party settled the controversy. (7) The conquest of the Riffs conducted by two members of the Council, France and Spain. (8) The occupation of the Ruhr wherein one party, France, undertook enforcement of the terms of the Treaty of Versailles.

221. **In no instance involving a threat of war or general peace, as prescribed in Article 11, has the Court dealt with the merits of the case on a basis of law and justice:** In each of the foregoing instances, whenever a settlement has been effected by other than the parties, political differences have been conciliated, but no judicial decision taken. In no instance has the Court been called upon for a judgment; but in four instances its advice has been sought, although not on the merits of the controversy. In two of these instances, the Conference of Ambassadors requested an opinion upon the finality of its own decision, in one instance the Mixed Commission for the Exchange of Greek and Turkish populations requested an interpretation, and in one instance the Council requested an opinion upon its own competence. The rule is established that it is the Council or the Conference of Ambassadors which possesses the competence to stop threats of war; that the Court has no competence under its Statute and that such competence as it has enjoyed has been as adviser to the Council and Conference.

222. **In certain instances disputes involving threats of war which one of the parties desired to submit to the Court for an advisory opinion have been withheld by the Council:**[3] Instances occur in the matter of the Hungarian optants

[3] For statement of the cases, see *Security Against War,* Chapter 33, on Questions Withheld from the Court, p. 612.

in Roumania wherein the former requested submission of the question to the Court, which request was not granted. Also in the matter of Memel wherein Lithuania proposed that the matter be referred to the Court which proposal the Allied Powers did not favor but requested instead a political adjudication by the Council. Finally in the matter of Vilna wherein Lithuania proposed that action taken by the Council be submitted for decision to the Court but which request was withdrawn after opposition in the Assembly, which body made such submission appear to be impossible.

223. Matters involving peace, as submitted under Article 11, establish the rule that whenever a controversy submitted to the Council is before the Conference of Ambassadors, the Council will not take jurisdiction under the authority conferred by Article 11: This rule was established during the Albanian-Jugoslav controversy in 1921.[4] It was upheld in the matter of the invasion of the Burgenland; also in the Bulgarian-Macedonian dispute; and successfully invoked in the Italo-Greek dispute. The rule was also sustained in the interpretation given to Article 15 by the Special Committee of Jurists, following the Italo-Greek dispute. That Committee sustained the principle that the Council must refuse to consider the application, when the dispute already forms the subject of arbitration or judicial settlement.

224. Matters involving peace, as submitted under Article 11, establish the rule that the advisory competence of the

[4] On that occasion the Council passed a Resolution of which the following is the pertinent section:

> The Council of the League of Nations is informed that the Conference of Ambassadors has taken up the Albanian question and that it is discussing it at the present moment. In these circumstances the Council of the League of Nations considers it inadvisable to take up the question simultaneously. (*Official Journal,* Sept., 1921, p. 725).

Court is not in effect limited to the Council and Assembly: The matters of Jaworzina and Saint Naoum establish the rule that the Allied Powers, acting as the Conference of Ambassadors, may obtain advice from the Court through using the Council as a medium of communication. In this manner, a few states may avail themselves of a privilege not apparently open to other combinations of states, for the Allied Powers, being permanent members of the Council, control the submission of requests for such opinions.

225. **General authorization to deal with threats of rupture between members of the League is granted to the League under the Covenant:** This provision is to be differentiated from those of Article 11 in that it is limited to members of the League and concerns disputes which, if they are likely to lead to rupture in relations, the members agree to submit to arbitration before resorting to war. Article 12 provides whenever a threat of war reaches the stage of a threatened rupture, members of the League agree that they will submit the matter to arbitration or judicial decision and that under no conditions will they resort to war until after three months following an award which must be given within a reasonable time. Threatened ruptures have occurred between Albania and Jugoslavia over the Albanian boundary, ending in war; between Italy and Greece, ending in the seizure of Corfu; between Lithuania and Poland, ending in the capture of Vilna; between Lithuania and the Allied Powers, ending in the capture of Memel; between Italy and Jugoslavia ending in the annexation of Fiume to Italy; and between Greece and Bulgaria, culminating in the recent invasion of Bulgarian territory.

226. **No matter in which a rupture between states was threatened has been referred to the Court:** All of the foregoing matters have been settled either by force, or diplomatic

intervention. In the matter of Corfu, Italy declined to permit any question to be submitted to the Court and in the matter of Memel, the Allied Powers preferred the intervention by the Council although in both instances resort to the Court was proposed by one of the parties.

227. A general obligation to submit disputes to arbitration before resort to war has been entered into by members of the League: Article 13 takes into consideration that, irrespective of threats of war which any member of the League may submit or of Article 12 wherein a rupture is threatened, there will arise disputes of a less grave character which may be considered to be generally suitable for submission to arbitration. In the event that these cannot be settled satisfactorily by diplomacy, members agree to submit them to arbitration. But unfortunately this Article permits of certain ambiguities. It provides that under this agreement states may recognize the dispute to be suitable for arbitration, and they may determine when diplomacy has failed; and although certain classes of legal disputes, namely questions as to the interpretation of a treaty, any question of international law, the existence of any fact which, if established, would constitute a breach of an international obligation, and the nature and extent of the reparation to be made for any such breach, are specified they are declared to be only generally suitable.

228. Four disputes have been submitted to the Council under Article 15, one of which has been the subject of an advisory opinion by the Court:[5] (1) In the matter of the Tunis and Morocco Nationality Decrees, France claimed, under paragraph 8 of Article 15, that the matter was domestic. The French contention was submitted to the Court for an advisory opinion. (2) The Greek appeal concerning the Italo-Greek

[5] For summary of opinions and judgments, see Annex I.

dispute referred to Article 15 and certain legal questions arose therefrom. The interpretation of these questions was, however, not referred to the Court by the Council but to a committee of jurists. (3) An appeal under Article 15 was made by Albania in December, 1924, with respect to hostilities with Jugoslavia; this appeal was withdrawn in February, 1925. (4) In the dispute between Great Britain and Turkey concerning Mosul, Turkey recognized the authority of the Council under Article 15 but this recognition has been recently revoked by Turkey and legal questions arising from this action have been submitted to the Court for an advisory opinion. The interpretation of Article 15 is not directly involved, since the questions concern the general nature of the decision to be taken by the Council.

229. **General authorization to deal with disputes between members and non-members of the League or between non-members of the League is granted to the League under the Covenant:** Article 17 authorizes the Council, in the event of a dispute between a member and a non-member of the League or between two non-members of the League, to invite the non-members to accept the obligations of membership in the League, upon such conditions as the Council may deem just. If the invitation is accepted, the provisions of Articles 12–16, as modified by the Council, become applicable. If the non-member refuses the invitation the Council may proceed with its inquiry and make a recommendation. If both non-member states refuse to accept the invitation, the Council may make recommendations or take measures to prevent hostilities between them.

230. **The general authority granted to the League under the Covenant to settle disputes leaves little opportunity for the Court to apply judicial decisions to the prevention**

of war: Under Article 11, the complaints are submitted to the Council which alone has authority to consider the matter and make a recommendation. Under Article 12, the parties agree to resort to arbitration, judicial decision or inquiry. Under Article 13, the parties agree to submit to arbitration or judicial decision any dispute which cannot be settled through diplomatic channels. Under Articles 15 and 17 it is the Council which receives the complaint and is authorized to act. In three, therefore, out of the five instances, the Council is the designated tribunal, and in the other two instances the matters thus far submitted to the Court have been referred by way of the Council for an opinion. In view of the preference thus given to the Council in the settlement of disputes and in view of the obligations undertaken by members to submit matters to the Council under Articles 12, 13 or 15 and in the absence of any obligation incurred to submit any dispute directly to the Court, it appears that the place of the Court in the international scheme for the settlement of disputes must continue to be largely advisory to the Council, for whatever obligation states have incurred to submit disputes, recognizes the competence of the Council under the Covenant, and largely ignores the Court under the Statute. It is evident, however, from the record of submissions and the prevalence of war that the general prevention of war as envisaged under the Covenant will give way to regional agreements to prevent war on a basis of mutual interest.

231. **The general authorization to the League to prevent war under the Covenant is modified by treaties of security applicable independently of the Covenant:** The majority of these agreements make no mention of a pacific settlement of disputes and their application is outside the terms of the Covenant even though the signatories are members of the League. This method of preventing war consists of a pledge from the

signatories to come to the assistance of each other in case of an attack by the state against which the alliances are framed. Instances of such treaties are: (1) The Little Entente, providing that Czechoslovakia, Roumania and Jugoslavia will come to the assistance of each other in case of an unprovoked attack by Hungary; thereby excluding the possibility of war with Hungary.[6] (2) Alliances between France and Belgium, France and Poland, France and Czechoslovakia, resulting in a combination of an army of approximately 1,200,000 men against the permitted German army of 100,000 men. The Little Entente made no mention of submitting their disputes with Hungary first to arbitration, neither do the treaties between France and her allies make provision for submission of disputes with Germany to such procedure, preliminary to resort to war.[7]

232. **The general authorization to the League to prevent war under the Covenant is modified by the regional security treaties of arbitration negotiated at Locarno which include commissions of conciliation:** These treaties, concluded between Germany and France, Belgium, Czechoslovakia and Poland, respectively, provide for two categories of disputes which may arise between the parties: (1) Those concerning the rights of parties; and (2) all other disputes. The following procedures are provided: (1) A dispute concerning the rights of parties may, by agreement between them, be submitted (a) to the Permanent Conciliation Commission, established by

[6] Hungary is permitted by the Treaty of Trianon to maintain an army of 35,000; the combined army of the Little Entente numbers over ten times as many men.

[7] Provision for pacific settlement of disputes between the signatory parties themselves are to be found in a few defensive alliances; the Franco-Czech Treaty and the alliance between Esthonia and Latvia being instances. The Italo-Jugoslav Treaty, however, where a real danger of conflicting interests exists, provides for no pacific settlement of disputes between Italy and Jugoslavia.

the Locarno Treaties for this purpose; (b) in case no agreement is reached before this Commission, the dispute is to be submitted by special agreement to the Court, or to an arbitral tribunal; (c) but if the parties cannot agree on the terms of submission, after one month's notice either of them may bring the dispute before the Court. (2) Disputes not involving the rights of parties will be (a) submitted, without any special agreement to the Permanent Conciliation Commission; (b) if, however, within a month from the termination of the work of the Commission the parties have not reached an agreement, the matter may at the request of either party be brought before the Council of the League, under Article 15 of the Covenant. In either of these cases, the Conciliation Commission, the Court, the arbitral tribunal, or the Council are all authorized to lay down provisional measures. Thus, to the mechanism of the Council and Court, there are here added arbitral tribunals and a Conciliation Commission for the prevention of war.

233. The general authorization to the League to prevent war under the Covenant is modified by the Locarno Treaty of Mutual Guarantee: This Treaty between Germany, France, Belgium, Great Britain and Italy, respectively, makes provisions for the prevention of war by means of (1) pacific settlement and (2) military guarantees. The procedure for pacific settlement is as follows: Any question concerning the rights of parties shall be submitted to judicial decisions; all other questions are referred to a conciliation commission; and if the proposals of this commission are not accepted, the Council will take up the matter under Article 15 of the Covenant. The military guarantees are intended to effect a prevention of war by forming a combined force of 1,500,000 against 100,000 should Germany violate the Treaty and attack France, or a combined force of 980,000 against 700,000 should France violate the Treaty and attack Germany.

234. Treaties of mutual security leave little opportunity to the Court to apply judicial decisions to the settlement of questions arising thereunder which provoke war: Under defensive treaties no case is likely to go to the Court, since no provision is made for submission of disputes other than between a small number of signatory states.[8] Under the Locarno Arbitration Treaties, the Court is a court of appeal from a commission of conciliation, and resort to it is optional, for arbitral tribunals may also be selected; finally in the Locarno Treaty of Guarantee the Court has jurisdiction over questions involving the rights of parties. It does not, however, appear to be specifically determined whether in this instance the Court will take jurisdiction upon appeal of one of the parties, or whether an agreement has to be reached by the parties for submission, and if it cannot be reached what action shall be taken.

235. The system established under the Covenant and regional agreements authorizes resort to war to preserve the status quo: (1) Under Article 12, if two of the members of the League have a dispute which is submitted to arbitration, and with the award of which neither party is satisfied, they may resort to war after an interval of three months from the date of the award. (2) Under the same Article, if there is a similar dispute between similar parties and the matter is submitted to the Council which makes a recommendation which neither party is willing to accept, then the parties may, after three months, resort to war. (3) Under Article 15, if the dispute is referred either to the Council or to the Assembly and either body renders a decision, except as to the parties in dispute, and this decision is unacceptable to both parties to the dispute, then they may resort to war. (4) Under Article 15 if neither the Council nor the Assembly can reach a decision

[8] See pp. 81, 84, 85.

which is unanimous, except for the parties to the dispute, then the parties thereto may resort to war. (5) All conflicts between states, not members of the League, would appear to be permissible between themselves in the settlement of a dispute, although the Council has the right to interfere in them. (6) The members of the League may participate in any war under the stipulations of Article 11, that "any war or threat of war, whether immediately affecting any of the members of the League or not, is hereby declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations." (7) The members of the League may engage in a general co-operative war to protect the covenants of the League whenever the Council so recommends. Under the regional agreements between France and Central European countries and under the Little Entente Treaty, the Italo-Jugoslav Agreement, and the alliances between Esthonia and Latvia, war is the authorized method of settling a dispute with the country against which they are drawn; while arbitration is in some instances to decide disputes among the beneficiaries under the combination. Under the Locarno Treaty of Mutual Guarantee, the military forces of the various guaranteeing powers may be called into action.

236. **The European policy of authorized warfare to preserve the status quo is not in consonance with the policy of the United States:** The policy of authorizing war between states to maintain the principles of the Constitution or that any group of states should be in a position to engage in war for this purpose was definitely repudiated when the United States Constitution was adopted. During the debate in the Senate over the ratification of the Treaty of Versailles, this method of settling disputes formed one of the main grounds

of objection.[9] During the discussion which has followed, there has been a division of opinion concerning the meaning of Article 16 of the Covenant and whether members of the League are under obligations to supply military forces when requested by the Council. There should be no doubt concerning this rule, namely when the Council is in agreement to resort to war to stop war, the forces of its members may be called into action under Article 16 of the Covenant to support the decision of the Council. Since the members of the Council possess among them the overwhelming majority of the military forces in Europe (exclusive of Russia and Turkey) the decision to resort to force taken by the Council presupposes the readiness of its members to enforce the decision.[10] But the practical application of the rule will depend somewhat upon the risk to the forces brought into action by the members of the Council. Where the disproportion between the forces at the command of the Council and those engaged in violating the Covenant is great, the rule will be applied with discretion. Such was the case in the Russian-Polish war, the Greco-Turkish war and the Italo-Greek crisis wherein the Council refrained from action. But in the Greco-Bulgarian crisis, the disproportion in forces in favor of the Allied Powers being great, the risk was proportionately small and the Council acted promptly.

237. The authorization of war to settle international disputes as the post-war European policy led to the initiation of an outlawry of war movement in the United States:

[9] Senate Reservation No. 3 provided that the United States would assume no obligation to preserve the *status quo* or to provide military or naval forces for the purpose without the consent of Congress in each particular case. (For text of resolutions, see *The Senate and the League of Nations,* by Henry Cabot Lodge, p. 180.)

[10] The action taken by the Council in the Greco-Bulgarian crisis, should leave no doubt whatever concerning the military powers under Article 16.

The first official expression of this policy appeared during the debate over the ratification of the Treaty of Versailles, when Senator Knox, in 1919, proposed an international league whereunder war was to be declared an international crime and any national engaging in war, except in self-defense, was to be punished by the world as an international criminal. It was the belief of Senator Knox that a League, formed on the basis of abolishing war, would "carry with it a minimum of loss of our sovereignty; it would relieve us from participation in the broils of Europe; it would preserve the Monroe Doctrine and save America from the results of European aggression and intrigue; it would reduce to the minimum the causes of war; and would make the waging thereof otherwise than in self-defense when attacked, a public crime punishable by the combined forces of the world."[11] The ratification of the Treaty of Versailles failed and the Knox proposal made no immediate progress, with the result that the Covenant with its authorization of war became the acknowledged method of obtaining security in Europe.

238. The practice of war since 1919 in the settlement of international disputes has developed the idea of outlawry of war into a national movement: This policy took official form on February 14th, 1923, when Senator Borah introduced a resolution in the Senate (No. 441) which provided that war between nations should be outlawed as an institution or means for the settlement of international controversies by making it a public crime under the law of nations. The preamble to this resolution declared: (1) That war is the greatest existing menace to society and has become so expensive and destructive that it not only causes stupendous burdens of taxation but threatens to destroy civilization. (2) That alliances, leagues and plans which rely upon force as the ultimate power for the

[11] Address before the Senate, March 1st, 1919.

enforcement of peace carry the seeds either of their own destruction or of military dominance to the subversion of liberty and justice. (3) That resolutions or treaties outlawing certain methods of killing will not be effective so long as war remains lawful and, therefore, there must be organized rules against war. (4) That in the constitutional convention of 1787 it was successfully contended that the use of force when applied to people collectively was unsound in principle and tantamount to a declaration of war. (5) That an agreement of a judicial character similar to that of the United States Supreme Court would not shackle independence nor impair the sovereignty of any nation. In accordance with these principles, the Resolution provides that: (1) War between nations should be outlawed as an institution or means for the settlement of international controversies by making it a public crime under the law of nations. (2) Every nation should be encouraged by solemn agreement or treaty to bind itself to indict or punish its own international war breeders or instigators and war profiteers under powers similar to those conferred upon our Congress by the Federal Constitution. In order to facilitate the application of these proposals, the Resolution stipulates as a first step the creation and adaptation of a code of international law of peace, amplified and expanded and based upon equality and justice between nations; and as a second step the creation of a judicial substitute (or adaptation of an existing international court) for war in the form or nature of an international court modeled upon the United States Supreme Court to possess affirmative (compulsory) jurisdiction to hear and decide all purely international controversies, as defined by the code or arising under treaties. (3) The judgments of the proposed court are to be enforced through the respect of all enlightened nations for judgments resting upon open and fair investigations and impartial decisions and the compulsory power of enlightened opinion. It is the intention of the resolution that a statute

making war a crime shall be part of the code of international law.

239. The principles underlying this movement have been defined:[12] The further use of war as an institution for the settlement of international disputes shall be abolished. (2) War between nations shall be declared to be a public crime except for the purposes of self-defense. (3) All annexations, seizures or exactions by force, duress, or fraud shall be null and void. (4) The international laws of peace shall be based upon equality and justice between nations and shall be expanded, adapted and brought down to date from time to time by conventions. (5) A judicial substitute for war shall be erected in the nature of an international court to possess affirmative jurisdiction to hear and decide all international controversies, as defined by the code or arising under treaties. (6) The jurisdiction of the court shall not extend to matters of governmental, domestic or protective policy unless one of the disputing parties has by treaty or otherwise given another country a claim that involves these questions. The classes of these disputes shall be incorporated in the code of law. (7) War must be outlawed before the Court is given affirmative jurisdiction. (8) National armaments are to be reduced to the lowest point consistent with domestic safety and reasonable international requirements. (9) Nations are to make a public report each year setting forth fully their armaments, thereafter to be verified by authorized committees, acting under the authority and jurisdiction of the Court. (10) Nations agree to bind themselves to indict and punish their own war instigators and war profiteers.

240. The growth of public opinion in the United States in favor of the abolition of war has turned the attention of

[12] As formulated by the Hon. S. O. Levinson, Chairman of the American Committee for the Outlawry of War (1925).

the League in this direction: In 1923, largely as the result of the visit of Viscount Cecil to the United States, the Treaty of Mutual Assistance declared, in Article 1, that aggressive war is an international crime which signatories undertake not to commit. The Geneva Protocol which, in 1924, succeeded the Treaty of Mutual Assistance, asserted that a war of aggression constitutes the violation of the solidarity of the members of the international community and is, therefore, an international crime. These undertakings of the League appear to depart from the American proposals in certain fundamental particulars: (1) The United States proposal contemplates a positive convention in which war is defined and condemned and its use made illegal; the League proposal contemplates that war shall be a crime for some states and a sanction for other states. (2) The United States proposal contemplates a system whereby war shall not be resorted to as a means of settling disputes whereas the League proposal is a scheme for compulsory arbitration, the evasion of which constitutes a crime. (3) The United States scheme proposes a code of law as a condition precedent to granting the Court obligatory jurisdiction; the League plan would grant such jurisdiction without a code, deeming the Covenant as amplified, to be sufficient. (4) The United States scheme proposes to create or adapt a court with jurisdiction to deal only with international controversies upon a judicial basis; the League plan continues the present Court with its advisory and non-judicial functions. (5) The United States proposal contemplates only that good faith and public opinion shall constitute the sanctions; the League plan contemplates military force as the sanction for security under the present system. (6) The United States proposal presupposes a judicial determination of the fact of the responsibility for war committed under an international statute of prohibition, whereas the League plan would make the prevalence of war *ipso facto* evidence of refusal to arbitrate and the application

of sanctions automatic without judicial determination of the fact of the culpability of a nation. (7) The United States proposal makes judgments, resting upon open and fair investigations and impartial decisions the basis for enforcement; the League plan would rely upon automatic procedure which requires no investigation nor impartial decision. (8) The United States proposal relies upon a court of justice to hear and determine international controversies; the League plan contemplates resort to the Council as chief executive of its proposed system.

241. A coalition agreement has been entered into for the purpose of uniting the peace forces in the United States: [13]

[13] The signatories to this coalition agreement include the following: Bruce Bliven, Associate Editor, New Republic, formerly editor of the New York Globe; E. C. Carter, Secretary, The Inquiry, formerly Senior Secretary of the Y. M. C. A. with the A. E. F. in France; John H. Clarke, former justice of the Supreme Court of the United States, now President of the League of Nations Non-Partisan Association; Donald J. Cowling, President, Carleton College; Herbert Croly, Editor, New Republic; Miss Mary Dreier, Executive Board, National Women's Trade Union League; Edward Mead Earle, Professor, Columbia University; Sherwood Eddy, National Council of the Y. M. C. A; William H. Hale, Attorney, Chicago; Carleton J. H. Hayes, Professor, Columbia University; John Haynes Holmes, Pastor, Community Church, New York, Editor, Unity; F. Ernest Johnson, Research Secretary, Federal Council of Churches; Paul Jones, Bishop of Protestant Episcopal Church; Mrs. E. F. Langworthy, Secretary, American Committee for the Outlawry of War; S. O. Levinson, Chairman, American Committee for the Outlawry of War; Halford E. Luccock, Contributing Editor, Christian Advocate; Julian W. Mack, Judge, United States Circuit Court; Charles Clayton Morrison, editor, Christian Century; Reinhold D. Nievuhr, President, Detroit Pastors' Union; Kirby Page, Writer and Lecturer; Raymond Robins, Lecturer; John Nevin Sayre, Secretary, Fellowship of Reconciliation; Professor James T. Shotwell, Director, Carnegie Endowment for International Peace, and co-author, American Plan for Security and Disarmament submitted to the Fifth Assembly at Geneva in 1924; Fred B. Smith, Federal Council of Churches; Norman Thomas, Director, League for Industrial Democracy; Wilbur Thomas, American Friends Service Committee.

On June 30th, 1925, a conference was held by the leaders of the peace movement in the United States at which a proposal was made for the endorsement of the adherence to the Court, to be contingent permanently upon the adoption of a statute outlawing war. At a further conference, held on June 23rd, an agreement was entered into and on July 15th, 1925, announcement was made that in order to make the Permanent Court of International Justice a more effective judicial substitute for war in the settlement of international disputes, this conference favors: (1) The immediate adherence to the Permanent Court of International Justice with the Harding-Hughes-Coolidge reservations. (2) Within two years after such adherence, the signatories to the Court Statute, including the United States Government, are to declare by governmental action their endorsement of the outlawry of war and are to call an international conference of all civilized nations for the purpose of making a general treaty. (3) Such treaty shall embody: (a) making war a crime under the law of nations, the question of self-defense not being involved: (b) a code of the international law of peace based upon the outlawing of war and upon equality and justice between nations great and small shall be formulated: (c) when war is outlawed the Court of Justice shall be granted affirmative jurisdiction over international controversies between sovereign nations as provided for and defined in the code and arising under treaties. (4) Should signatories to the Court Statute fail within two years after the adherence of the United States to make such a declaration and to join in a conference for the purpose of making such treaty the United States may, in its discretion, withdraw its adherence; and further should such adherence fail within five years after the adherence of the United States, to make and execute a general treaty embodying in substance the aforesaid principle, the adherence of the United States shall thereupon terminate.

242. The movement in the United States to outlaw war is moving forward in three distinct sections: (1) The abolition of war and establishment of a court is proposed in the Borah Resolution. This section is opposed to affiliation with the present Court of Justice as constituted or with the League of Nations. (2) The abolition of war through the present Court of Justice is proposed in the coalition agreement. (3) The abolition of war is proposed by adherents of the League and the Court through the sole use of that international machinery. Should the United States adhere to the Court with the reservations proposed by the coalition agreement, the American plan to attack the institution of war may be given the opportunity for discussion at an early date at an international conference called by the signatories to the Court Statute.

243. The Borah Resolution is the only proposal submitted to the Senate which has for its object increasing the competence of the Court to prevent war: The Harding-Hughes plan does not increase the competence of the Court to prevent war, for it stipulates that the United States will not accept the optional clause. The United States not being a member of the League is not in a position to urge members of the League to resort more frequently or preferably to the Court or to increase its jurisdiction. On the contrary, adherence under the Harding-Hughes plan contributes to the perpetuation of the present system which concentrates authority for the settlement of disputes in the Council or in smaller regional groups or commissions and tolerates the sanction of war as a method of enforcing judicial decisions.

CHAPTER XVI

LAWS TO BE ADMINISTERED BY THE COURT

244. It must not be possible for the Court to abstain from giving a decision: The acceptance of this general rule was made necessary by the fact that the Court was granted a measure of obligatory jurisdiction and that it could not, within the limits of its competence, refuse to consider a matter submitted to it. In order to observe the above principle, the Court Statute in Article 38 lays down five rules which the Court is to apply.

245. The parties to a convention may establish the rules which the Court will apply: Whenever the dispute arises under a treaty or convention, whether it is general or particular, the Court will apply the rule expressly recognized by the parties. These rules, however, are not given the broad application of international law, for they must be expressly recognized by the contesting states and are law only as between the parties.

246. International custom is recognized as a source of international law: The second paragraph of Article 38 of the Statute provides that international customs, as evidence of a general practice accepted as law, shall be applied by the Court. It is, therefore, the duty of the Court to determine in each matter submitted whether there is an international custom, established by conventions or practices extending over a sufficiently long period of time and accepted by nations in general, to imply their status as customary law. This rule is in ac-

cordance with the recommendation made by the Advisory Committee of Jurists.

247. **General principles of law recognized by civilized nations shall be applied by the Court:** These principles are to be applied only in the absence of conventional or customary law. This rule apparently includes not only a reference to the sources of international law but the future definition of such law. This general and somewhat vague provision has given rise to the fear that the Court might exercise legislative powers in attempts to discover general principles recognized by civilized nations. But there was also the danger that the Court might have to declare itself incompetent through lack of applicable rules, were it to be confined alone to conventional law and custom. This rule is also in accordance with the recommendation made by the Advisory Committee of Jurists.

248. **Judicial decisions and teachings of the most highly qualified publicists of the various nations are established as a subsidiary means for the determination of rules of law:** By judicial decisions is undoubtedly meant those of national courts, and, accordingly, the decisions of the United States Supreme Court may be taken into consideration. The teachings of qualified publicists are, however, of more doubtful value; and it may be questioned whether such teachings, even when used as the basis of a judgment, will be readily accepted as law. This rule is in accordance with the recommendation made by the Advisory Committee of Jurists.

249. **Article 59 constitutes an exception to the foregoing rule:** Its addition to the Statute was recommended by the Council; and it provides that the decision of the Court has no binding force except between the parties and in respect of that particular case. A reference to paragraph 4 of Article 38

makes the foregoing rule subject to the operation of this Article. The object of this amendment to the draft Scheme, as proposed by the Council, appears to have had in view establishing the arbitral principle in the procedure of the Court, namely, that the Court may overrule any previous decisions it may have made. This rule, however, does not prevent the Court from adhering in successive cases to an established principle of law. The effect of Article 59 is that it leaves the Court free to disregard its decisions or to observe them as precedents in its own discretion and it, therefore, remains to be seen whether the principle of following them as precedents will prevail. Upon this speculation M. Bourgeois in his report to the Council throws some light. He observes that it might happen that a case appearing important in itself might be submitted to the jurisdiction of the Court and that the Court might take a decision on this case, laying down certain principles of international law, which, if they were applied to other countries, would completely modify the principles of the traditional law of that country, and which might, therefore, have serious consequences. It was, therefore, M. Bourgeois' view that states should be given the right of intervention, in which case they also would be bound by the decision; but other states should not be affected thereby; and to make this certain Article 59 was adopted.[1] This view would seem to raise the question whether states, not directly affected by a decision in that they are neither parties nor do they intervene, may be indirectly affected by reliance upon a previous decision when their interests become involved in other matters before the Court. Whatever course may be taken by the Court, it is unquestionably true that the insertion of Article 59, with its limitation upon the application of decisions of the Court, marks a reversion to arbitral procedure.

[1] *P. C. of I. J. Doc. Concerning Action of Council,* p. 50.

250. Article 59 is not applicable to advisory opinions: The Court has adopted the practice of applying the rules contained in Article 38 to opinions as well as judgments. It would seem from the restriction of the application of Article 59 to decisions that the exception is not applicable to opinions and that they may be relied upon as precedents. An illustration occurred in the opinion delivered in the matter of Saint Naoum, wherein the Court referred to the opinion delivered in the matter of the Polish-Czechoslovakian boundary controversy, involving much the same kind of question.

251. The Court may decide a case ex aequo et bono upon the request of the parties: This rule was proposed by the Third Committee of the First Assembly and constitutes an addition to the rules laid down by the Advisory Committee of Jurists. This rule, in effect, authorizes the Court to deal with a case according to equity and good conscience without respect to the rules of law previously established; and duplicates the field of the Permanent Court of Arbitration. It also extends the field of arbitration; for although the Court possesses chiefly optional jurisdiction and in this respect is an arbitral body, nevertheless it apparently may not refuse any case coming within its competence nor may it make any conditions for the submission. It was apprehended that the Court might be requested to render a decision in a matter wherein there was no positive rule of law or custom to guide the deliberations of the Court. According to paragraph 5 of Article 38, the Court may then request the parties to permit it to decide the case *ex aequo et bono,* thus relieving it of the embarrassment of having no law wherewith to decide the matter. The addition of this rule makes it possible for the Court to consider political as well as legal questions and widens the scope of the competence of the Court; for if the parties agree to submit such matters *ex aequo et bono,* the Court cannot refuse to consider them.

252. The rule of ex aequo et bono does not apply to advisory opinions: According to the terms of the Statute it is limited to decisions and requires the consent of the parties. Properly speaking there are no parties in a proceeding for advisory opinions and, therefore, the rule is not applicable. Since, however, the Court may prescribe the advisory procedure this may be anything which the Court and the parties agree upon.

253. The insufficiency of international law constitutes an obstacle to the extension of obligatory jurisdiction: These general rules for the Court presuppose that there are in existence discernible rules of law and of custom acceptable to civilized nations. The Advisory Committee of Jurists recognized that these principles and rules had been thrown into confusion by the war, and that they were insufficient to sustain the measure of obligatory jurisdiction which they proposed to give to the Court. The conduct of the war revealed the flimsy character of agreements made between individual states as a basis of law or order during a crisis. The methods of warfare carried on through new inventions and scientific discoveries and through the air revealed the inadequacy of existing laws. The Conventions adopted at the Hague in 1907 to regulate the conduct of war were seen to be in need of complete revision, if they were to be made applicable to the conduct of modern warfare.

254. The Peace Treaties disregarded generally accepted rules of international law: The Peace Conference at Paris was concerned primarily with political and economic terms of settlement in which reparations and security were the primary considerations. The Conference was not deeply concerned whether these arrangements violated existing principles of international law. The result is that new principles of inter-

national law have been written into these Treaties, which, if upheld by the Court, will tend to establish a new public law. Illustrations occur in the provisions which alter the rights of sovereign states. For instance, Article 279 of the Treaty of Versailles requires Germany to accept, in advance, designations of the consular agents of the Allied and Associated Powers to exercise their functions in German ports and towns even though such agents are *persona non grata* to the German Government. Article 281 provides that if the German Government engages in international trade it shall not be deemed to have any rights, privileges or immunities of sovereignty. Sections III and IV of Part X permit the confiscation of private property, eliminating the distinction in law which has come to differentiate non-combatants from the combatants. In the case of the S. S. "Wimbledon," the Court held that where the principles of the law of neutrality appeared to be in conflict with the provisions of the Treaty of Versailles, the latter would prevail.

255. The Commission on the League of Nations made no provision in the Covenant for the development and application of international law:[2] This Commission, charged with drafting the Covenant, appears to have given little consideration to the question of the law which the proposed Court should apply, the theory being that its primary duty would be to interpret and facilitate the terms of the Peace Treaties. When the

[2] In a letter to Senator Lodge Mr. Root referred to this omission in the following terms:

> International law is not mentioned at all except in the Preamble; no method is provided and no purpose is expressed to insist upon obedience to law, to develop law, to press forward agreement on its rules and recognition of its obligations. All questions of right are relegated to the investigation and to recommendation of a political body to be determined as matters of expediency. (*Congressional Record,* June 23rd, 1919; 66th Congress, First Session.)

draft Covenant was made public on February 14th, 1919, attention was called to this omission; but it was not rectified. Consequently there is no reference to international law in the Covenant other than appears in the Preamble to the effect that one of its objects is to promote the firm establishment of the understandings of international law as the actual rule of conduct among governments. No further provision is made for the realization of this purpose.[3] On the contrary, the scheme for the pacific settlement of disputes, contained in the Covenant, makes no reference to law and Article 20 provides that the Covenant is to be accepted by members of the League as abrogating all obligations or understandings which may be inconsistent with its terms; and that states will not enter into any new engagements inconsistent with such terms. Treaties of arbitration and regional understandings are alone exempted under Article 21.

256. The Hague Conference of 1907 made provision for the calling of a Third Hague Conference. Such Conference was to have been called in 1915, and in accordance with the action taken in 1907, a preparatory committee was engaged in collecting the various proposals to be submitted to the Conference, including the subjects which it was deemed practicable to include in international regulations.

257. For these general reasons, the Advisory Committee

[3] At the time the Covenant appeared, Mr. Root suggested an amendment making provision for the codification of international law through conferences as follows:

> The executive council shall call a general conference of the powers to meet not less than two years nor more than five years after the signing of this convention for the purpose of reviewing the condition of international law and of agreeing upon and stating in authoritative form the principles and rules thereof.
>
> Thereafter regular conferences for that purpose shall be called and held at stated times.

of Jurists proposed a resolution for the codification of international law:[4] This Committee had in mind: (1) Estab-

[4] Text of the Resolution follows:

The Advisory Committee of Jurists, assembled at The Hague, to prepare the constituent Statute of a Permanent Court of International Justice:

Convinced that the extension of the sway of justice and the development of international jurisdictions are urgently required to ensure the security of states and well-being of the nations, recommend that:

I. A new inter-State Conference, to carry on the work of the two first Conferences at The Hague, should be called as soon as possible for the purpose of:

1. Re-establishing the existing rules of the Law of Nations, more especially and in the first place, those affected by the events of the recent war:

2. Formulating and approving the modifications and additions rendered necessary or advisable by the war, and by the changes in the conditions of international life following upon this great struggle:

3. Reconciling divergent opinions, and bringing about a general understanding concerning the rules which have been the subject of controversy:

4. Giving special consideration to those points which are not at the present time adequately provided for, and of which a definite settlement by general agreement is required in the interests of international justice.

II. That the Institute of International Law, the American Institute of International Law, the Union Juridique Internationale, the International Law Association and the Iberian Institute of Comparative Law should be invited to adopt any method, or use any system of collaboration that they may think fit, with a view to the preparation of draft plans to be submitted, first to the various Governments, and then to the Conference, for the realization of this work.

III. That the new Conference should be called the Conference for the Advancement of International Law.

IV. That this Conference should be followed by periodical similar Conferences, at intervals sufficiently short to enable the work undertaken to be continued, in so far as it may be incomplete, with every prospect of success. (*Records of the First Assembly, Committees,* Vol. I, p. 462.)

lishing the existing rules of the law of nations, especially those affected by the war. (2) Formulating and approving the modifications and additions rendered necessary or advisable by the war and by the changes in international life following the war. (3) Reconciling divergent opinions and bringing about a general understanding concerning the rules which have been the subject of controversy. (4) Giving especial attention to the points not at the present time especially provided for and of which a definite settlement by agreement is required in the interests of international justice. As proposed in Resolution I, submitted to the Council, the purpose was to restate existing law and to propose new laws in the form of general agreements, and to deal with the fundamental principle of international law.

The Committee proposed that this task should be undertaken by existing scientific organizations, namely that the Institute of International Law, the American Institute of International Law, the Union Juridique Internationale, the International Law Association and the Iberian Institute of Comparative Law should be invited to adopt any method or use any system of collaboration with a view to preparing draft plans to submit to the various governments. The Committee also proposed that the Academy of International Law which had been suspended during the war, should be set in operation side by side with the Permanent Court of International Justice and the Permanent Court of Arbitration at The Hague. The Committee proposed, when these organizations had completed their preliminary work, that a new interstate conference should be called for the advancement of international law, to be followed by periodic conferences at intervals for the continuation and completion of the work.

258. **The League of Nations rejected the recommendation of the Advisory Committee of Jurists:** The opposition to this proposal developed in the Assembly, on the ground that the Assembly was in reality the body to carry on the work be-

gun at The Hague and that the codification of law was solely within the field of the League.[5] In accordance with this belief, the Third Committee drafted a resolution inviting the Council to take up the matter of securing from authoritative institutions suggestions for the best method of co-ordinating and defining the rules of international law.[6] This resolution was defeated on the ground that the time was not opportune to take up this work; and the Assembly took no action concerning a substitute provision.[7]

259. A plan for the progressive codification of international law was adopted by the Assembly four years later: On September 22nd, 1924, largely as the result of a movement in the United States, led by Senator Borah, the

[5] The Third Committee considers that the Assembly of the League of Nations is, in reality, itself continuing this work [the work of The Hague Conferences], and that it would be superfluous to establish an additional organization made up in the same way. (*Records of the First Assembly, Committees,* Vol. I, p. 588.

[6] The Assembly of the League of Nations invites the Council to address to the most authoritative of the institutions which are devoted to the study of international law a request to consider what would be the best methods of co-operative work to adopt for the more precise definition and more complete co-ordination of the rules of international law which are to be applied in the mutual relations of states. (*Ibid., Committees,* Vol. I, p. 589.)

[7] Viscount Cecil expressed the prevailing viewpoint when he addressed the Assembly as follows:

> I venture to hope that this recommendation will not be proceeded with at present. To my mind, we have not got to a stage yet where it is desirable to consider the codification of international law. This is really the first step toward codification. It is a request, unless I have misunderstood it, to a variety of learned societies to devote their attention to the codification of international law. I think that a very dangerous project at this stage in the world's history. I hope that we shall not proceed with it at the last moments of this Assembly, or without very much more consideration. (*Records of the First Assembly,* p. 745.)

Assembly passed a resolution in which it requested the Council to convene a committee of experts representing the main forms of civilization and the principal legal systems of the world.[8] This committee, after consulting with the various scientific organizations which have devoted themselves to the study of international law, was given the duty: (1) To prepare a pro-

[8] The text of the Resolution follows:

The Assembly,

Considering that the experience of five years has demonstrated the valuable services which the League of Nations can render towards rapidly meeting the legislative needs of international relations, and recalling particularly the important conventions already drawn up with respect to international conciliation, communications and transit, the simplification of customs formalities, the recognition of arbitration clauses in commercial contracts, international labour legislation, the suppression of the traffic in women and children, the protection of minorities, as well as the recent resolution concerning legal assistance for the poor;

Desirous of increasing the contribution of the League of Nations to the progressive codification of international law:

Requests the Council,

To convene a Committee of Experts, not merely possessing individually the required qualifications but also as a body representing the main forms of civilization and the principal legal systems of the world. This Committee, after eventually consulting the most authoritative organizations which have devoted themselves to the study of international law, and without trespassing in any way upon the official initiative which may have been taken by particular states, shall have the duty:

(1) To prepare a provisional list of the subjects of international law, the regulation of which by international agreement would seem to be most desirable and realisable at the present moment;

(2) After communication of the list by the Secretariat to the Governments of States, whether Members of the League or not, for their opinion, to examine the replies received; and

(3) To report to the Council on the questions which are sufficiently ripe and on the procedure which might be followed with a view to preparing eventually for conferences for their solution. (*Official Journal, Special Supplement,* No. 21; p. 10.)

visional list of the subjects of international law, the regulation of which seemed to be most desirable. (2) After communication of the list by the Secretariat to the governments of states, to examine the replies received; and (3) to report to the Council. The Council, at its meeting held in Rome in December, 1924, decided to appoint a Committee to undertake this work.[9] The Committee selected for consideration a certain provisional list of subjects. These topics were then divided among various subcommittees with a *rapporteur* in charge of each. These committees are authorized to make a preliminary survey of the field, and are to report to the main Committee the results

[9] The following were invited to serve on the Committee:—M. Hammarskjöld, Governor of Upsala, Chairman; Professor Diena, Professor of International Law at the University of Turin, Vice-Chairman; Professor Brierly, Professor of International Law at the University of Oxford; M. Fromageot, Legal Adviser to the Ministry for Foreign Affairs of the French Republic; Dr. J. Gustavo Guerrero, Minister of Salvador in Paris; Dr. Bernard C. J. Loder, former member of the Supreme Court of the Netherlands, President of the Permanent Court of International Justice; Dr. Vilhena Barbosa de Magalhaes, Professor of Law at the University of Lisbon, former Minister for Foreign Affairs, for Justice and Education of Portugal; Dr. Adelbert Mastny, Minister for Czechoslovakia in London, President of the Czechoslovak Branch of the International Law Association; M. M. Matsuda, Doctor of Law, Minister Plenipotentiary of Japan; M. Simon Rundstein, former Legal Adviser to the Ministry for Foreign Affairs of Poland; Professor Walter Shücking, Professor at the University of Berlin; Dr. José Leon Suarez, Dean of the Faculty of Political Sciences of the University of Buenos Aires; Professor Charles de Visscher, Professor of Law at the University of Ghent, Legal Adviser to the Ministry for Foreign Affairs of Belgium; Dr. Chung Hui Wang, Deputy Judge of the Permanent Court of International Justice (China); Mr. George W. Wickersham, former Attorney-General of the United States, member of the Committee of International Law of the American Bar Association, and President of the American Law Institute; a Spanish legal adviser (Mr. Botella, of Spain, was subsequently invited); a legal expert in Moslem law.

of their findings and they are to make recommendations.[10]

260. The co-operation with organizations devoted to the study of international law was authorized by an Assembly Resolution: In accordance with this Resolution, the Committee appointed by the Council has invited organizations, devoted to the development of international law, to co-operate in the work. These organizations include those mentioned in the recommendations made by the Advisory Committee of Jurists, together with certain other organizations.[11] In addition, the American Society of International Law has appointed a special committee to co-operate in the work of preparation.[12]

[10] The following are the topics selected and the personnel of the sub-committee in charge of each:—

(1) Nationality: *Rapporteur,* M. Rundstein; members, M. Magalhaes and M. Schücking. (2) Territorial waters: *Rapporteur,* M. Schücking; members, M. Magalhaes and Mr. Wickersham. (3) Diplomatic privileges and immunities: *Rapporteur,* M. Diena; member, M. Mastny. (4) Legal status of ships owned by the state and used for trade: *Rapporteur,* M. Magalhaes; member, Mr. Brierly. (5) Extradition and criminal jurisdiction of states with regard to crimes perpetrated outside of their territories: *Rapporteur,* Mr. Brierly; member, M. de Visscher. (6) Responsibility of states for damages suffered within their territories by foreigners: *Rapporteur,* M. Guerrero; members, M. de Visscher and M. Wang. (7) Procedure of international conferences and the conclusion and drafting of treaties: *Rapporteur,* M. Mastny; member, M. Rundstein. (8) Suppression of piracy: *Rapporteur,* M. Matsuda; member, M. Wang. (9) Limitation: Sole member, M. de Visscher. (10) Exploitation of the produce of the sea: Sole member, M. Suarez. (11) List of subjects of private international law: *Rapporteur,* M. Brierly; member, M. de Visscher.

[11] The organizations invited include the following:

The Institute of International Law, the American Institute of International Law, the International Law Association, the *Institut Ibérique de Droit Comparé,* the *Union Juridique Internationale,* the American Society of International Law, the International Maritime Committee, and the *Société de Législation Comparée.*

[12] The members of the Committee include the following:

Jesse S. Reeves, University of Michigan, Chairman; Edwin M.

261. The plan adopted by the League does not fulfill the requirements set forth by the Advisory Committee of Jurists or by the Borah Resolution: While preëmpting the field of codification, the plan of the League differs from the original proposal of the Advisory Committee of Jurists in certain essential particulars: (1) The Committee proposed an interstate conference, consisting of representatives designated by states; the Council has adopted a plan of a specially selected Committee in its own discretion. (2) The Committee contemplated (a) re-establishing rules of law affected by the war, (b) formulating and approving modifications made necessary by the war, (c) reconciling divergent opinions and (d) giving attention to points not provided for and wherein a definite settlement by agreement is required; the list of subjects adopted by the Committee, appointed by the Council, for preliminary study does not fulfill the purpose of the resolution proposed by the Jurists. (3) The method proposed by the Advisory Committee of Jurists, namely of periodical conferences, has been supplanted by a select Committee working under the direction of the Council and not with the authority of states. The two proposals are alike chiefly as to the identity of the legal societies which are to be invited to co-operate. The Borah Resolution to outlaw war proposed a code of international law based upon equality and justice between nations. The essential difference between this proposal and the undertaking of the Committee appointed by the Council is that the Borah Resolution calls for the codification of law on the basis that war is a crime while the Committee of the League is proceeding with its work on the basis that war is an authorized and legitimate method for the adjudication of international controversies. Furthermore,

Borchard, Yale University; Philip Marshall Brown, Princeton University; Charles G. Fenwick, Bryn Mawr College; Arthur M. Kuhn, the New York Bar; Ellery C. Stowell, The American University, and Quincy Wright, University of Chicago.

the Borah Resolution contemplated a code of law to be used as a basis for extending the jurisdiction of the Court to unilateral summons, whereas the work of the Committee of the League bears no immediate relation to such jurisdiction.

262. **The rejection of the proposal of the Advisory Committee of Jurists and the failure of the Court Statute to provide for the development of international law has given rise in the United States to a difference of opinion concerning the wisdom of immediate adherence of the United States to the Court Statute:** On the one hand it is contended that the establishment of judicial institutions need not necessarily await the development of international law, for there are treaties and a sufficient body of international law and a sufficient history of the practice of nations to make judicial institutions workable and imperative. On the other hand, it is contended that international law, since the war, is in the condition wherein the efforts of a court to construe it or apply it would amount to legislation, and that there are few accepted principles which have not suffered through the war; and, therefore, what is required, prior to adherence to the Court, is the assurance that the recommendations of the Advisory Committee of Jurists will be carried out and that the Court will be provided with a body of law to administer whenever disputes arise.

CHAPTER XVII

INTERNATIONAL SANCTIONS IN RELATION TO THE COURT

263. The Statute of the Court makes no provision for sanctions: The enforcement of the decisions of the Court is nowhere provided for; nor are the parties appearing before the Court required to accept in good faith its decisions or to execute them.[1]

264. The general sanctions for the decisions of the Court are in the Covenant:[2] The Advisory Committee of Jurists made no provision for sanctions in the draft Scheme by reason

[1] It should be noted that Article 61 of the Statute provides that the Court may require compliance with its decision before it admits proceedings in revision of its previous judgment. This may be regarded as a species of enforcement of a decision.

[2] In an address to the Advisory Committee of Jurists on the opening of its sessions, M. Bourgeois said:

> Finally, there is a last point of view which we must take in order to envisage the necessary relations between the League of Nations and the International Court of Justice, and the close solidarity which exists and which will always exist to an increasing degree between their two actions.
>
> I approach here briefly the decisive problem of sanctions.
>
> What would be the efficacy, what would be the reality of a sentence of justice, if it did not find in a strong organization of international institutions what one calls in a technical term the executory of these decisions?
>
> The Covenant foresees several degrees of sanction, juridical sanction, diplomatic sanction, economic sanction, and as a last resort, and, within limits very closely confined, military sanctions. * * *
>
> Speaking in the name of the Council of the League of Nations we are ready to assume as completely as possible the extent of its [Court] competence and the execution of its judgments. *P. C. of I. J. Pub., Proceedings of the Committee,* p. 10.

of the fact that it considered these sanctions to be already provided for in the Covenant. When the draft Scheme was discussed in the Third Committee of the First Assembly, the chairman pointed out that the sanctions provided for in Article 13 must *a fortiori* apply to the awards of the Court and that in any case Article 16 would be applicable, since a non-execution of the judgment of the Court would constitute a violation of the Covenant.[3] A proposal that the Statute specify the nature of penalties was made by the Argentine Delegation but it was rejected by the Third Committee; and another proposal made by the representative of Panama, to the effect that the Court shall propose what steps should be taken in the event of failure to carry out its decrees, was defeated by the plenary Assembly.[4] In respect, therefore, to sanctions, the constitution of the League is analogous to other political instruments which make provision for a judiciary department in addition to executive and legislative bodies.

265. Sanctions for judicial decisions may be devised by the Council: The authority for such implement is vested in the Council under Articles 12 and 13 of the Covenant. Under Article 12, members of the League agree that should there arise between them any dispute likely to lead to rupture they will submit the matter to arbitration or inquiry or judicial settlement; and they agree in no case to resort to war until three

[3] M. Politis in his book *La Justice Internationale* states:

> Article 13 gives the Council the right to intercede for the purpose of ensuring respect for a judgment, even when the non-execution of such judgment does not imperil peace. * * * This sanction applies to all arbitrations between members of the League, and, still more, to the decisions of the Permanent Court of International Justice. * * * The new form of Article 13 of the Covenant, wherein the Permanent Court of International Justice is specifically mentioned, leaves not the slightest doubt on this subject. (p. 247.)

[4] *Records of the First Assembly,* p. 456

months after the award or a judicial decision or a report by the Council. Article 13 provides that members of the League agree to carry out in full good faith any award or judicial decision that may be rendered and that they will not resort to war against any member which complies therewith. But in the event of the failure of a member to carry out an award or judicial decision, the Council shall propose what steps shall be taken to give effect thereto.[5] The steps which the Council will propose constitute the sanction for the judicial decision. If the decision of the Court is accepted and carried out no occasion arises for devising a form of sanction. If the decision of the Court is accepted and not carried out it is the responsibility of the Council to devise means of securing its fulfillment, but if one party accepts the decision and the other party does not then, in the absence of war, it does not appear that the Council may take any steps to devise a sanction. And while it is mandatory upon the Council to propose steps to give effect to a decision of the Court, it does not appear to be obligatory upon any party to accept them, nor is the Council granted authority to proceed beyond the mere proposal. It may be said, therefore, that the Council may devise sanctions but they are inapplicable unless voluntarily accepted by the parties; or in the event of war made by one party upon a party accepting the decision. In the event that both parties reject the decision, as they may do, the Council has no power to devise sanctions.

266. The general rule under Article 13 may be given a wide application through existing treaties: For a full ap-

[5] The Covenant originally provided for arbitration and for inquiry by the Council. Amendments ratified in 1924 make effective the inclusion of "judicial settlements" and "judicial decisions" in Articles 12 and 13 of the Covenant. The effect of these amendments is to bring judicial decisions or settlements within the sanctions provided for by the Covenant.

preciation of this fact it is necessary to review the jurisdiction conferred upon the Court. Under the clauses of the Treaties of Peace relating to transit (Articles 336, 337, 376 of the Treaty of Versailles and corresponding articles of the other Treaties), the League is to provide the manner of settlement of disputes with respect to transit and communications. The enforcement of such decisions falls, therefore, under Article 13 of the Covenant. Under Mandates, the annual reports, submitted by mandatories to the Permanent Mandates Commission, which, in turn, forwards such reports, with its observations to the Council, ensure the enforcement of a decision of the Court. If, for example, Great Britain had refused to comply with the decision of the Court, concerning the Mavrommatis Palestine Concessions, the report on the Palestine Mandate would have contained this refusal, and the Permanent Mandates Commission would have brought to the attention of the Council that the action of Great Britain constituted a failure to carry out an award, under paragraph 4 of Article 13 of the Covenant. Similarly, under Minority Treaties, the enforcement lies with the League since it guarantees the protection of minorities. Disputes under political conventions, treaties of conciliation or commercial treaties between members of the League, fall under paragraph 2 of Article 13 of the Covenant; and their enforcement will arise, therefore, from the Covenant, quite immaterial of whether the parties have elected to appear before the Permanent Court or some other tribunal.

267. **Judgments of the Court may be enforced under the Covenant by economic and military sanctions:** These sanctions are specified in Article 16 of the Covenant and are of two kinds: (1) Economic sanctions, under paragraph 1, consisting of the severance of trade and financial relations between members of the League and the state or states not executing the judgment which failure constitutes the state a covenant-

breaking state; and (2) military sanctions comprising the use of military, naval and air forces to be contributed by members of the League on recommendation of the Council.[6] These sanctions are applicable only when a state resorts to war in violation of Articles 12, 13 or 15 of the Covenant.

268. These economic and military sanctions are applicable by members of the League: Whenever the Court renders a decision involving members of the League which have accepted the obligations of Articles 12, 13 or 15, and such a

[6] Text of Article 16 is as follows:

Should any member of the League resort to war in disregard of its covenants under Articles 12, 13 or 15, it shall *ipso facto* be deemed to have committed an act of war against all other members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the Covenant-breaking state, and the prevention of all financial, commercial or personal intercourse between the nationals of the Covenant-breaking state and the nationals of any other state, whether a member of the League or not.

It shall be the duty of the Council in such case to recommend to the several governments concerned what effective military, naval or air force the members of the League shall severally contribute to the armed forces to be used to protect the covenants of the League.

The members of the League agree, further, that they will mutually support one another in the financial and economic measures which are taken under this article, in order to minimise the loss and inconvenience resulting from the above measures, and that they will mutually support one another in resisting any special measures aimed at one of their number by the Covenant-breaking state, and that they will take the necessary steps to afford passage through their territory to the forces of any of the members of the League which are co-operating to protect the covenants of the League.

Any member of the League which has violated any covenant of the League may be declared to be no longer a member of the League by a vote of the Council concurred in by the Representatives of all the other members of the League represented thereon.

member refuses to execute its terms, and resorts to war against a party accepting it, or resorts to war against a party accepting a recommendation of the Council containing the substance of such judicial decision, then the members of the League are expected: (1) To undertake individually, and without recommendation by the Council, to sever trade and financial relations with the Covenant-breaking state, and to prohibit intercourse between nationals. These constitute the economic sanctions. Each state may apply them in the degree and manner it sees fit.[7] (2) To contribute the armed forces necessary to carry out a recommendation made by the Council. The manner of their contribution and the direction of the forces are not defined. (3) To permit armed forces to pass through their territory in the enforcement of sanctions.

269. Under what conditions, by whom and when general economic and military sanctions will become applicable has not been determined: Efforts to interpret and apply these sanctions have been made from the beginning: (1) The International Blockade Committee undertook to state the rule early in the history of the League by framing replies to four questions for the purpose of interpreting Article 16.[8] In answer to the first question, namely, under what conditions should sanctions be applied, the Committee laid down the principle that

[7] An amendment to Article 16, adopted by the Fifth Assembly, but not yet having received sufficient ratifications to be in force, provides that the intercourse will first be prohibited between persons residing in the territory of the Covenant-breaking state and persons residing in the territory of other states and the prohibition will be extended to nationals only if deemed expedient. Other amendments adopted by the Second Assembly and not yet in force provide that the Council decides whether a breach of the Covenant has taken place, sets the date for the application of economic pressure, and permits postponement in certain cases.

[8] *Records of the Second Assembly*, pp. 450–58.

at the outset war should be avoided and peace should be restored by economic pressure; but that Article 16 (paragraph 1) entitles member states to declare themselves at war with a Covenant-breaking state. To the second question, namely, whose duty is it to decide that the necessity for sanctions has arisen, the Committee replied that it was the duty of each member to decide for itself either with or without a recommendation from the Council. To the third question, namely, at what moment and by whom shall sanctions be applied, the Committee replied that all states should be treated alike but it might be necessary to recommend the execution of special measures to certain states. In answer to the question how should sanctions be applied, the Committee recommended, and the Assembly passed, nine resolutions dealing with diplomatic relations, economic severance, correspondence, communications and other practical matters. The nature of the answers to these questions indicates the differences of opinion underlying the application of sanctions. While it is true that each state is free to apply sanctions and that a recommendation by the Council would encourage states to apply them, it is equally true that no state appears to be willing alone to incur war to enforce a judgment of the Court; and collective agreements wherein a few states guarantee the execution of an agreement are superseding individual action and general sanctions. (2) The Treaty of Mutual Assistance, adopted by the Fourth Assembly in 1923, but not ratified by a sufficient number of states, undertook to grant to the Council additional authority to determine the fact of aggression and to apply sanctions, going so far as to authorize the Council to create a higher command to take charge of military operations. (3) The Protocol for the Pacific Settlement of International disputes, adopted by the Fifth Assembly, in 1924, but not ratified by a sufficient number of states, constituted any state resorting to war without resorting to arbitration or judicial settlement, an aggressor and made

the application of sanctions automatic without determining the fact of aggression or the merits of the case. These two instruments had for their object strengthening the provisions of Article 16 with respect to sanctions, to be applied generally by all members of the League or by such members as the Council may designate.

270. **The essential principle of general sanctions under the Covenant is that the enforcement of a judicial decision is conditioned upon its being also a violation of the Covenant:** A member of the League refusing to execute a judgment of the Court, or the terms of its opinion embodied in a recommendation of the Council, incurs no risk of having a sanction applied unless its refusal to execute the decision of the Court amounts to a violation of its undertakings under the Covenant. The rule is, therefore, that a decision of the Court possesses sanctions only when its non-enforcement constitutes also a violation of the Covenant, unless provisions are made elsewhere under Peace Treaties when these will be in addition to sanctions under the Covenant.

271. **Economic and military sanctions are applicable by members of the League under the Peace Treaties:** Whenever a matter is referred to the Court for a judgment, sanctions attach in the manner specified in a treaty, and in the discretion of the chief executors of these treaties, namely, the Allied Powers: For members of the League, an illustration is afforded by the labor section of the Treaty of Versailles wherein the Court may indicate economic sanctions to be applied by states under the Treaty. For non-member states, an illustration is afforded by Article 386 of the Treaty of Versailles whereunder the matter of the S. S. "Wimbledon" arose. In the event that Germany had not observed the decision of the Court, the Allied Powers, acting as the Conference of Ambassadors or

otherwise, would have been in a position to apply economic or military sanctions of their own choosing. Had the question involving the payment of reparations, which led France to occupy the Ruhr, been referred to the Court, the sanction applicable would have been that prescribed in the Treaty. Had the Albanian and Serb-Croat-Slovene States not accepted the decision of the Conference upheld by the opinion of the Court in the matter of Saint Naoum (and later exchanged territories pacifically) the sanctions would have vested in the Allied Powers; and the same would have been the case in the matter of Jaworzina.

272. **Regional agreements for the prevention of war afford sanctions enforceable by the guarantors of the agreements:** These agreements are of two general kinds: (1) Where states enter into defensive alliances, enforceable outside the terms of the Covenant; such agreements contain no reference to the provisions of the Covenant neither as regards a preliminary effort for pacific settlement of disputes nor as regards sanctions. The signatory states, having guaranteed to protect each other's interests, or to apply joint protective measures, or to come to the assistance of the party attacked, apparently may apply sanctions independently of the League.[9] Examples of such types of alliances are the Franco-Belgian, Franco-Polish, Franco-Czech, Roumano-Polish, Italo-Jugoslav and Esthonian-Latvian Treaties. (2) Where states enter into agreements guaranteeing boundaries, enforceable by military sanctions to be applied by regional states within certain limitations imposed by the terms of the Covenant; such is the Locarno Treaty of Mutual Guarantee, whereunder Great Britain and Italy guarantee the boundary between Germany and France and between Germany and Belgium. Provision is

[9] An instance occurred on the occasion of the attempted return of ex-King Charles IV to Hungary. The Little Entente states in accordance with their treaty, threatened war, which was only prevented by the withdrawal of ex-King Charles.

made for pacific settlement of disputes, in accordance with the Covenant, and while the guarantor states apply sanctions in case of a violation of the Treaty, and the guarantor states themselves decide when such flagrant violation has taken place, the matter may also be brought before the Council, and the parties agree to act in accordance with recommendations issued by that body "provided that they are concurred in by all the members other than the representatives of the parties which have engaged in hostilities." [10] Under this new type of treaty, therefore, the guarantor states may use the rights conferred specifically on the Council by Article 16 of the Covenant, of deciding when military sanctions shall be applied; but having made this decision, they agree to act in accordance with the recommendations of the Council. It is, however, specifically stated that the Treaty "shall not be interpreted as restricting the duty of the League to take whatever action may be deemed wise and effectual to safeguard the peace of the world" [11] and it remains to be seen whether the powers of the Council take precedence over the powers of the parties.

273. **Economic and military sanctions are applicable to non-members of the League only to the extent of their acceptance of the instruments containing such sanctions:** Under this rule, sanctions contained in treaties are applicable by the High Contracting Parties in the manner prescribed; and no state would be liable to the sanctions provided for in the Covenant until it became a member of the League. While it is true that Article 17 provides a contrary rule with reference to action to be taken by the Council, nevertheless the Court has held that it will render no opinion and presumably no judgment, under an instrument not signed by the parties.[12] Conse-

[10] Guarantee Treaty of Locarno; Article IV.

[11] *Ibid,* Article VII.

[12] For summary of opinion in the Eastern Carelian question and that of the Oecumenical Patriarch, see Annex I.

quently, no question of sanctions will arise. If, however, a State desiring to use the Court, and required to make a Declaration, as prescribed by the Council, makes such Declaration, then it agrees to carry out the decision of the Court and not to resort to war against a party accepting the decision. This, in effect, is accepting the provisions of Article 13 of the Covenant and it is a permissible inference that in so doing a non-member state would bring itself within the sanctions prescribed in the Covenant for both member and non-member states. The provision relating to a Declaration is, however, subject to the terms of Article 35 of the Statute relating to the provisions of treaties.[13]

274. Economic sanctions are applicable by members of the International Labor Organization under the Peace Treaties: Under the labor sections of the Treaty of Versailles, the Court will specify the economic measures to be applied to a state not complying with its decision and member states may apply the measures prescribed and their application shall cease only upon a decision of the Court favoring their discontinuance. The sanctions are limited to economic measures and it is optional with members to apply these sanctions.

275. Economic and military sanctions are applicable to advisory opinions under certain conditions: An advisory opinion becomes enforceable only by reason of its acceptance by the agency requesting it through the Council. For this reason, no sanction attaches to the opinion *per se*. In the case of the Council, if a report is unanimously agreed to by the members, other than the representatives of the parties, the members agree that they will not resort to war with any party

[13] In accordance with such provisions, Germany was exempted from making a Declaration, in the case of German interests in Polish Upper Silesia, see Annex I.

which complies with the recommendation contained in the report. When the opinion of the Court becomes the substance of such a report and recommendation, the opinion then acquires the same force as any other recommendation by the Council and a state resorting to war is subject to the sanctions contained in Article 16 in the same manner as though it were a judicial decision. In the case of the Conference of Ambassadors, when it requests an opinion through the Council, a sanction will attach to the decision of the Conference embodying the substance of that opinion, to be executed by the forces of the Principal Allied Powers. Whenever an international organization such as a Labor Conference or a Mixed Commission requests an interpretation of its competence through an advisory opinion the enforcement will rest with these bodies.

276. **The lack of sequence between the definite legal character of the decisions of the Court and the indefinite political character of sanctions detracts from the judicial character of the entire proceeding:** Whereas the decision of the Court is definite and based upon principles of law and is taken according to a fixed procedure, there is no corresponding certainty concerning its enforcement. Nor is there any assurance that the sanction recommended by the Council will be proportionate to the offense complained of or appropriate to the decision; or that political considerations will not influence its execution to the exclusion of a just remedy. This lack of sequence is due to the fact that the Court is not authorized, except under the labor clauses, to indicate measures which it believes to be appropriate to the execution of its decision. In this respect the Court is an arbitral not a judicial body, for members of the League apply the prescribed sanctions.

277. **The United States is not amenable to the sanctions contained in the Covenant:** By reason of being mentioned

in the Annex to the Covenant, the United States, in order to use the Court, need not make the Declaration required of non-member states; and not being a member of the League it incurs no obligations under the Covenant. The United States is not, therefore, formally bound to carry out the decisions of the Court in cases where it is a party, nor to refrain from going to war, nor to submit to any steps taken by the Council to enforce a decision, even though it involves a member of the League. Were the United States invited under Article 17 to accept the terms of membership in the League for the purpose of settling a dispute and to decline, the Court, following the opinion in the Eastern Carelian matter, would doubtless hold that it had no jurisdiction in view of the United States not having accepted the Covenant. There can be no doubt, however, that the United States in affiliating with the Court will be accepting, in principle, a tribunal which has economic and military sanctions which can be brought into execution by the Council of the League; or by the Conference of Ambassadors; or by other groups whenever members of these bodies are agreed to enforce a decision of the Court.

278. No proposal before the Senate contains any reservation concerning sanctions: Adherence under the Harding-Hughes plan would, therefore, recognize the existing system wherein such sanctions as exist for the decisions of the Court are vested in the members of the League of Nations acting under the Covenant; and wherein they are applicable on the theory that failure to execute a decision of the Court constitutes a violation of the Covenant. And, notwithstanding the fact that sanctions, thus vested in the League are not now applicable to the United States, it would seem desirable that the United States should make clear its policy not to recognize international sanctions of force as applicable to decisions of a Court with which it becomes affiliated.

CHAPTER XVIII

PROPOSALS SUBMITTED TO THE SENATE

279. When the Senate meets on December 7th, 1925, it will not have before it any proposal without reservations for affiliation with the Court: The traditional attitude taken by Mr. Wilson and the Democratic party in favor of adherence without reservations has been abandoned;[1] and the Democratic minority in the Senate, led by Senator Swanson, has submitted the proposals of the Republican Administration, namely the Harding-Hughes plan.[2] The Resolution introduced by Senator Swanson in 1923, and re-introduced in 1924, appears not to be in accordance with the Democratic National platform of 1924.[3] Senator Willis, in the closing session of the Sixty-eighth Congress, apparently for purposes of political strategy, introduced a resolution similar to the Democratic Resolution.

[1] This attitude was defined in a letter from Mr. Wilson to Representative Rouse, under date of April 14th, 1920, wherein he stated:

> In reply to your letter of March 29th, let me say that I approve not of the conditional but of the *unconditional* adhesion of the United States to the World Court set up under the auspices of the League of Nations, though I think it would be more consistent with the fame of the United States for candor and courage to become a member of the League of Nations and share with other members the full responsibilities which its Covenant involves.

[2] For text of Senator Swanson's Resolution, see Annex V.

[3] That part of the National Democratic platform relating to the Court, follows:

> It is of supreme importance to civilization and to mankind that

280. The Harding-Hughes plan favors affiliation with the Court on five conditions: The proposal for affiliation is contained in a recommendation made by the Secretary of State to President Harding under date of February 13th, 1923, and transmitted to the Senate under date of February 24th, 1923.[4] The message was referred to the Committee on Foreign Relations which has not reported favorably upon the recom-

America be placed and kept on the right side of the greatest moral question of all time, and therefore the Democratic party renews its declaration of confidence in the ideal of world peace, the League of Nations and the World Court of Justice as together constituting the supreme effort of the statesmanship and religious conviction of our time to organize the world for peace. Further, the Democratic party declared that it will be the purpose of the next administration to do all in its power to secure for our country that moral leadership in the family of nations, which, in the providence of God, has been so clearly marked out for it.

There is no substitute for the League of Nations as an agency working for peace; therefore we believe that, in the interest of permanent peace and in the lifting of the great burdens of war from the backs of the people and in order to establish a permanent foreign policy on these supreme questions, not subject to change with change of party administrations, it is desirable, wise and necessary to lift this question out of party politics; and to that end to take the sense of the American people at a referendum election, advisory to the government, to be held officially under act of Congress, free from all other questions and candidacies, after ample time for full consideration and discussion throughout the country upon the question, in substance, as follows:

Shall the United States become a member of the League of Nations upon such reservations or amendments to the Covenant of the League as the President and the Senate of the United States may agree upon?

Immediately upon an affirmative vote we will carry out such mandate.

[4] For text of memorandum submitted by Mr. Hughes to President Harding, see Annex IV.

mendations contained therein. The proposal is as follows:

> Accordingly I beg leave to recommend that, if this course meets with your approval, you request the Senate to take suitable action advising and consenting to the adhesion on the part of the United States to the protocol of December 16th, 1920, accepting the adjoined Statute of the Permanent Court of International Justice, but not the optional clause for compulsory jurisdiction; provided, however, that such adhesion shall be upon the following conditions and understandings to be made a part of the instrument of adhesion:
>
> I. That such adhesion shall not be taken to involve any legal relation on the part of the United States to the League of Nations or the assumption of any obligations by the United States under the Covenant of the League of Nations constituting Part I of the Treaty of Versailles.
>
> II. That the United States shall be permitted to participate through representatives designated for the purpose and upon an equality with the other states' members, respectively, of the Council and Assembly of the League of Nations in any and all proceedings of either the Council or the Assembly for the election of judges or deputy judges of the Permanent Court of International Justice, or for the filling of vacancies.
>
> III. That the United States will pay a fair share of the expenses of the Court as determined and appropriated from time to time by the Congress of the United States.
>
> IV. That the Statute for the Permanent Court of International Justice adjoined to the protocol shall not be amended without the consent of the United States.

The non-acceptance of the optional clause relating to obligatory jurisdiction, as noted above, is declared to be the policy of the United States.

281. Mr. Harding's supplemental proposals are but partially before the Senate:[5] These supplemental proposals were made by President Harding at St. Louis, in an address

[5] That part of the speech relating to the Court follows:

> Granting the noteworthy excellence, of which I, for one, am fully

made on June 21st, 1923. In this address President Harding suggested a method of electing judges, a method of contributing to expenses, and a change in the advisory procedure of the Court. His first suggestion is embodied in the Lodge and Pepper Resolutions separating the Court from the League; his two last suggestions remain to be incorporated in a Republican plan.

282. President Coolidge has accepted the Harding-Hughes plan, without the later recommendations made by President Harding: The death of Mr. Harding and the accession of Mr. Coolidge to the Presidency made it necessary to restate the Republican Administration policy. In his first address to Congress on December 6th, 1923, Mr. Coolidge

convinced, of the Court as now constituted, why not proceed in the belief that it may be made self-perpetuating? This could be done in one of two ways: (1) by empowering the Court itself to fill any vacancy arising from the death of a member or retirement for whatever cause without interposition from any other body; or (2) by continuing the existing authority of the Permanent Court of Arbitration to nominate and by transferring the power to elect from the Council and Assembly of the League to the remaining members of the Court of Justice.

The fixing of compensation of the judges, supervision of expenditures, the apportionment of contributions, etc., could also be transferred from the League to either the Court of Arbitration or a commission designated by the member nations. Thus, incidentally, would be averted the admitted unfairness of the present system, which imposes a tax upon the members of the League who are not subscribers to the Court.

The exclusive privilege now held by the League to seek advisory legal guidance from the Court might either be abolished, or, more wisely, perhaps, be extended to any member or group of member nations. Thus all would be served alike, subject as now to determination by the Court itself of the kind of questions upon which it would render judgments.

formally announced his adoption of the Harding-Hughes plan.[6] In an address on May 30th, 1924, Mr. Coolidge reiterated his policy;[7] and the Republican platform supported this policy.[8]

[6] Text of that part of the address relating to the Court follows:

Our foreign policy has always been guided by two principles. The one is the avoidance of permanent political alliances which would sacrifice our proper independence. The other is the peaceful settlement of controversies between nations. By example and by treaty we have advocated arbitration. For nearly twenty-five years we have been a member of The Hague Tribunal, and have long sought the creation of a permanent World Court of Justice. I am in full accord with both of these policies. I favor the establishment of such a court intended to include the whole world. That is, and has long been, an American policy.

Pending before the Senate is a proposal that this Government give its support to the Permanent Court of International Justice, which is a new and somewhat different plan. This is not a partisan question. It should not assume an artificial importance. The Court is merely a convenient instrument of adjustment to which we could go, but to which we could not be brought. It should be discussed with entire candor, not by a political but by a judicial method, without pressure and without prejudice. Partisanship has no place in our foreign relations.

As I wish to see a court established, and as the proposal presents the only practical plan on which many nations have ever agreed, though it may not meet every desire, I therefore commend it to the favorable consideration of the Senate, with the proposed reservations clearly indicating our refusal to adhere to the League of Nations.

[7] Text of statement relating to the Court, follows:

More than a year ago President Harding proposed that the Senate should authorize our adherence to the protocol of the Permanent Court of International Justice, with certain conditions. His suggestion has already had my approval. On that I stand.

I should not oppose other reservations, but any material changes which would not probably receive the consent of the many other nations would be impracticable. We cannot take a step in advance of this kind without assuming certain obligations. Here again if we receive anything we must surrender something.

[8] Text of the plank in the Republican platform of 1924 follows:

The Republican Party reaffirms its stand for agreement among

283. A separatist proposal was submitted to the Senate by Mr. Lodge, then chairman of the Committee on Foreign Relations: This Resolution was introduced on May 9th, 1924 by Mr. Lodge.[9] It contained sixty-seven articles completely divorcing the Court from the League, and was accompanied by an explanation prepared by the Hon. Chandler P. Anderson, ex-Counsel to the State Department. It provided (1) for the election of judges through an Electoral Commission, consisting of a general committee and a special committee composed of representatives from Great Britain, France, Italy, Japan and the United States; (2) for the reduction of the votes of the British Empire from seven to one; (3) for denunciation of the Court Statute; (4) for the limitation of advisory opinions; (5) for the recognition by the Court of the authority of the laws of the United States within its own jurisdiction as applied to foreigners and foreign-owned property; and (6) for special agreements to be concluded by the United States and the other parties in interest, before a case is submitted to the Court, such agreements to have the approval of the Senate or the President.

284. A Republican majority proposal was submitted to the Senate by Mr. Pepper: The Resolution was introduced

the nations to prevent war and preserve peace. As an important step in this direction we endorse the Permanent Court of International Justice and favor the adherence of the United States to this tribunal as recommended by President Coolidge. This Government has definitely refused membership in the League of Nations and to assume any obligations under the Covenant of the League. On this we stand.

While we are unwilling to enter into political commitments which would involve us in the conflict of European policies it should be the purpose and high privilege of the United States to continue to cooperate with other nations in humanitarian efforts in accordance with our cherished traditions.

[9] *Senate Resolution* No. 122, 68th Congress, First Session; for text of Resolution, see Annex VI.

on May 26th, 1924, and had for its object the separation of the Court and the League by the elimination from the Statute of all references to the Covenant or to the League.[10] This Resolution was referred to the Committee on Foreign Relations and was reported by a majority of the Committee, together with a report. It is now before the Senate and provides, in general, as follows: (1) Amendments to the Protocol of signature, opening the Court to all states and authorizing the deposit of ratifications not with the Secretary-General of the League, but with the Registrar of the Court. (2) A new method of electing judges directly by the signatories, and for the omission from the Court Statute of all references to the League of Nations. The report accompanying this Resolution contained the following data: (1) The theory of a World Court and of a general international law; (2) a brief history of the Court of Justice; (3) the plan of the Court and the Protocol; (4) the existing relation between the League and the Court; (5) amendments and reservations; (6) the Swanson Resolution and the Committee Resolution; (7) the vote of the British Empire in the Assembly. (8) the Monroe Doctrine; and (9) the way to peace.

285. The Senate will consider the subject of adherence to the Court Statute on December 17th, 1925: There is a difference of opinion concerning what will take place when this discussion opens in the Senate. It appears, however, that since this session of Congress is the beginning of the Sixty-ninth Congress, the only matter before the Senate will be the unfinished business of the President's message of February 24th, 1923. If this is the correct interpretation, that message may be called up, and any one of the proposals now before the Senate, including

[10] *Senate Resolution* No. 234, 68th Congress, First Session; for text of Resolution, see Annex VII.

the Lenroot, Swanson, Willis, King, Lodge and Pepper Resolutions may be debated. If, however, during the interim between the 7th of December when Congress meets and the 17th when the debate is taken up, other resolutions are introduced and referred to the Committee on Foreign Relations and that Committee reports out a measure, then it appears such resolution will be the subject of debate. In view of the difference of opinion over the procedure, it is impossible to predict what the precise procedure will be or whether there will be other resolutions.

286. The proposals to separate the Court from the League are not acceptable to members of the League on grounds of policy: The main reasons follow: (1) The League of Nations System comprises three departments: legislative (the Assembly); executive (the Council); and judicial (the Court). There is no expressed desire on the part of members of the Council, or members of the League to change the system by dismembering the organization through detaching its Court. On the contrary the members of the League appear to be satisfied with the present arrangement. (2) The great Powers have constructed the Court for the purpose of facilitating the application of the Peace Treaties and for this purpose have granted to the Court a measure of obligatory jurisdiction which necessitates that the Council direct the general policy of the Court. (3) The experiment undertaken by the Versailles Treaty and supplemental treaties is a European network of schemes for the settlement of disputes in which processes of conciliation, inquiry, arbitration, judicial advice and judicial decision are inextricably combined, with military and economic sanctions applicable in varying degrees and terms. To undertake a separation of the Court would be to throw into confusion a variety of agreements which recognize the solidarity of the Council and the Court for their execution. It is not a

proposal which European states will regard with friendliness. (4) The system of national judges prevails by reason of their election as representatives of the League. There is not the slightest possibility that the Powers which dominate the Council will consent to any plan whereby they incur the risk of not having a permanent national on the Court. The interposition of the League makes it possible to elect nationals as representatives of the League without incurring such risk. (5) The affiliation of the United States is regarded in Europe as of moral rather than material value, as contributing to the widespread acceptance of the Peace Treaties through their interpretation and application; if the price of such affiliation necessitates the imposition of United States policies upon the Court, together with amendments to the Covenant and Statute, the burden of adjustment is on the League, which there is no reason to assume that it will undertake, unless affiliation with the Court is to be regarded as preliminary entrance into the League.

287. The proposal to separate the Court from the League is impractical on technical grounds: It has been assumed that the omission of the references to the Covenant and to the League and Council in the text of the Statute would be sufficient. Such is not the fact, for the separation of the Court from the League requires that affirmative provision be made for certain functions now performed by the League and for the proper functioning of the Court: (1) Provision should be made for withdrawals of signatory states, now possible only through the League. (2) Provisions should be made for revision of the Statute, now vested in the League. (3) Provisions should be made in the Statute for the sanction of good faith. (4) Provision should be made whereby the League could not alter the meaning of the Statute nor impose non-judicial duties upon the Court through conventions. (5) Provision should be made for the presence of a national of

every party when one party has a national or for the withdrawal of all nationals of the parties in advisory proceedings if they are retained in any form. (6) Intervention by groups of states whether it be the Council or the Conference of Ambassadors or any other body between the parties and the Court should be made impossible if political influence is to be eliminated from adjudications. (7) The accessibility of the Court by states only for purposes of adjudicating disputes should be precisely stipulated in the Statute. (8) Some method of raising and apportioning funds for the expenses of the Court should be indicated. In other words, it is not sufficient to undertake to detach the Court from the League: there must be also an affirmative proposal supplying the needs created by such separation.

288. The proposal to affiliate with the Court under the Harding-Hughes conditions does not adequately protect the interests of the United States: These proposals were made three years ago before the policy of the League and the Court had been fixed. In the light of the policies adopted since the recommendations were made, the pending proposals are inadequate and should be revised in accordance with the known policy of the League and the Court, which policies were not known at the time the recommendations were made to the Senate. The policies to be taken into consideration include the following: (1) In 1923, when the proposal was submitted to the Senate, it was not known that the Court would become an almost exclusively advisory body to the Council. But since February, 1923, the Court has had submitted to it twelve matters, of which eight called for advisory opinions and four for judgments. Nor was it comprehended that the Court would be almost exclusively occupied with interpreting and applying the terms of the Peace Treaties. But of all the matters submitted, only two, the Nationality Decrees of

Tunis and Morocco, and the Status of Eastern Carelia, arose under conventions not a part of the Peace settlement; but in neither instance could the Court deal with the merits of the question submitted. Also, both of these matters were submitted for opinions and not for judgments indicating the range of the advisory competence of the Council and of the advisory proceedings of the Court. (2) When the proposal was submitted to the Senate, it was not known that the Court would undertake extra-territorial duties nor that it would perform non-judicial acts of a political nature as it is permitted to do under Article 36. Such is the fixed policy of the Court. (3) In 1923, it was not known that the Court would be called upon to settle controversies by making appointments of arbitrators, thus making its function subsidiary to conciliation and arbitral proceedings through the appointment of officers to serve in other tribunals. Under these circumstances the advancement of the judicial opportunities of the Court to settle international controversies on a basis of justice dissolve under its co-operation with political tribunals. (4) In 1923, it was assumed that domestic questions were safeguarded under paragraph 8 of Article 15 from consideration or recommendation by the Council. The Japanese amendment to the Geneva Protocol indicated that such guarantee might be interpreted differently, a position in which the entire Assembly concurred. In 1923, it was not appreciated that the judicial settlement of international controversies, as provided for by the Advisory Committee of Jurists, would certainly give way to the political settlement of such disputes through the Council. The Treaty of Mutual Assistance in September of 1923, the Geneva Protocol of September, 1924, the Locarno Treaties of October, 1925, and the record of the settlement of disputes establishes beyond a doubt that the Council and not the Court is the authoritative body to settle disputes and whatever part the Court plays in such settlements will be largely tributary

to the Council; and, therefore, whatever contribution the adherence of the United States makes, will strengthen, not the judicial settlement of disputes through the Court, but their political adjudication through the Council. (5) When the proposal was made to the Senate in 1923, it was not known that the character of the Court could be profoundly altered without changing a line in the Statute. The interpretation in the Geneva Protocol given to the optional clause in Article 36 of the Statute and the interpretation of Article 36 given by the Court under the Lausanne Treaty proves beyond a doubt that such independent instruments may change the character of the Court. Therefore, any reservations concerning amendments of the Statute proposed in the early history of the Court, are clearly inadequate in the light of more recent history. The record should be examined in its wider ramifications. (6) In 1923, it was not known that through these indirect interpretative revisions of the Statute, the Court might be used as the instrument to extend the competence of the League, but such was the revelation made in relation to domestic questions by the Geneva Protocol. (7) When the proposal was made to the Senate, it was not appreciated that through the broad provision of Article 14 all forms of jurisdiction conferred upon the Court were convertible into advisory proceedings and that the contribution of the United States in future may be largely limited to this competence. But the labor cases, and the procedure adopted for transit, and for controversies over minorities indicate that such is the fact and that the policy of intervention by the Council between the parties and the Court has now become fixed. (8) In 1923, it was known that the Advisory Committee of Jurists, and two Americans—Mr. Root and Mr. Moore—had expressed their concern over the resort to advisory opinions in cases involving litigious matters—as being contrary to all juridical principles and as not advancing the method of judicial decision between states. It is now

known that every one of the twelve questions submitted by the Council for an advisory opinion has involved a right of the discretionary power of a state, of free speech, of the right to conduct researches, or of the rights of liberty, property, citizenship or of autonomy in domestic affairs. The policy has been fixed by the Council which has submitted these matters for opinions. This policy is so diametrically opposed to the policy of the Federal and State Courts of the United States, as declared without exception, that it calls for an explanation as to the grounds upon which a reconciliation of the two policies may take place. (9) When the proposal was submitted to the Senate it was not appreciated that litigant states would be placed in a position of inequality before the Court on the theory that because the proceeding was advisory, the issues were less real. Nevertheless, the dispute over Iraq is being heard with Great Britain having a national on the bench and Turkey not being so favored. This is contrary to the whole principle underlying the institution of national judges, wherein the policy of the Court was adopted on the ground that the main types of civilization were to be represented and it is so stated in the Statute. The Mohammedan group certainly represents a distinct type of civilization and has no national on the Court in a case involving its most vital economic interests. The practice of inequality before a court is not one which the United States accepts in principle. (10) When the proposal was submitted to the Senate, there was confusion concerning the nature of the sanctions behind the decisions of the Court. The Locarno Treaty of Mutual Guarantee leaves no doubt that the military and economic sanctions contained in Article 16 of the Covenant will become the sanctions for decisions of the Court and that they will be applied through regional guarantees. This provision definitely brings the decisions of the Court within military sanctions, and there

would seem to be no reason why treaties in the future should not lay upon the Court the duty of nominating Allied commanders to head military expeditions, arranged by guarantors, to enforce decisions of the Court. The Locarno guarantee is a fact; the use of the Court to direct operations to execute its decisions is a probability; both to be taken into consideration in the debate upon the question of adherence. (11) In 1923, when the adherence of the United States was recommended, it was not believed possible that the Court would come to occupy so unimportant a place in the prevention of war, and that the Council and Conference of Ambassadors and conciliation tribunals and every kind of pacific settlement, other than judicial decision, would be preferred to the Court. The Geneva Protocol with its devitalizing of the optional clause and regional pacts, and the actual record of wars and settlements, indicated that the whole process of settling disputes is headed up to the Council and to the Allied Powers and not to the Court with its more representative composition. No state in the light of the record can hope to contribute to pacific settlement except in the degree to which it recognizes the authority of the League of Nations over its members. The development of the machinery of the Council and of the Secretariat and the increasing network of agreements by which the powers of the Council are definitely augmented as an interventional body between parties and the Court are facts which have become apparent since 1923. The trend toward conciliation, the reversion to arbitration, the new advisory policy, and the small place reserved for judicial decisions suggests that if the United States desires to maintain the traditional principles underlying conciliation, arbitration and judicial decisions, and their careful delimitation restricting each to the field in which it is competent to function effectively on a basis of appropriate procedure and law, further inquiry may be desirable.

289. Questions of principle and policy are involved in the pending proposals: The Lodge plan proposes: (1) Calling of a Third Hague Conference; (2) definition of "state," excluding dominions and colonies, reducing the British vote to one in the election of judges; (3) enlargement of the Court and election of judges by general and special committees; (4) expiration of term of office of a part of the judges every three years; (5) extraordinary sessions of the Court to be called only by two signatory states; (6) impeachment of judges by special committees; (7) fixing of salaries in the Statute; (8) omission of *ex aequo et bono;* (9) abolition of special chambers for labor and transit; (10) revision of a judgment when the Court applies a theory of international law which a general conference of states has refused to recognize as such; (11) the authority of United States laws within its own jurisdiction to be recognized by the Court; (12) advisory opinions may not be rendered on specific questions recognized by the United States to be domestic; and (13) cases in which the United States is a party require a special agreement, having consent of the Senate, for submission of a dispute to Court. The Pepper plan proposes: (1) The amendment of the Statute as a condition to adherence; (2) disclaimer of responsibility for advisory opinions; (3) adherence to Monroe Doctrine; and (4) separation of Court from League. The Hughes-Harding plan proposes: (1) Adherence with the privilege of participation in elections; (2) right to a voice in amendment of the Statute; and (3) of performance of political duties within the League of Nations. The reconciliation of these various proposals, together with the fulfillment of the pledges of the Republican party, appears to be the problem before the Senate.

CHAPTER XIX

INTERPRETATION AND EXTENSION OF PENDING PROPOSALS

290. The general statement that adherence shall not involve any legal relation on the part of the United States to the League of Nations nor the assumption of any obligations under the Covenant requires interpretation: This condition lays down a general principle. In the absence of any definition or indication as to what will constitute a legal relation or obligation under the Covenant, the interpretation of this condition will be left to the executive branch of the Federal Government. It seems, therefore, desirable that the Senate, in accepting this general principle, should state its understanding in the form of an interpretative resolution covering certain essential points to the effect: (1) The United States understands that in this act of adherence, it assumes no obligation to be bound by an election, decision, act, report or finding of the Council or Assembly of the League of Nations; also, that it incurs no obligation whatsoever under the Covenant or the Treaty of Versailles; and that any national of the United States may withdraw (as provided for in Article 24 of the Statute) in any matter wherein the Court undertakes to perform any duties under the Peace Treaties other than the determination of suits between states or whenever the Court sustains any non-judicial relation to the League of Nations. (2) The United States understands that under Articles 12 and 13 of the Covenant, as amended to include judicial decisions, the recommendations for general sanctions for the execution of opinions or judgments of the

Court are vested in the Council of the League of Nations and that the sanctions which the Council may recommend to members of the League may be either of an economic or military character, as specified in Article 16, and that they are applicable to non-member states under Article 17 of the Covenant. Should the United States submit any dispute to the Court, it is with the understanding that it will refuse to accept or accede to the right of the Council to recommend sanctions with respect to any judgment or opinion rendered in any matter to which the United States is a party. The United States will continue its policy of relying upon good faith for the enforcement of treaty obligations and international law. (3) The United States reserves the right to withdraw its adherence to the Protocol establishing the Permanent Court of International Justice, through resolution by the United States Senate, whenever that body shall deem the grounds to be sufficient therefor. Such withdrawal shall become effective within a period of one year after the adoption by the United States of the resolution of withdrawal. During such period of one year, no decision taken by the Court shall impose any obligation upon the United States, but all obligations incurred prior to the resolution of withdrawal shall be faithfully executed.[1] (4) The United States will not submit to the jurisdiction of the Court, nor to arbitration or inquiry by the League of Nations, nor to an advisory opinion by the Court, any question which, in the judgment of the United States, depends upon or relates to its established policy, commonly known as the Monroe Doctrine; which is hereby declared to be wholly

[1] The late Senator Lodge proposed the following condition:

A signatory Power may withdraw from the Court and terminate its obligations under this statute after giving two years' notice of its intention to do so to the secretary of the Electoral Commission or to the other signatory powers.—Article LXIV of Resolution No. 122, 68th Congress, First Session.

outside of the jurisdiction of the League of Nations and of the Permanent Court of International Justice and unaffected by any provisions contained in the Covenant, Court Statute, or any instrument which is intended to supplement, or interpret the said instruments. (5) The United States reserves to itself exclusively the right to decide what questions are within its domestic jurisdiction and declares that all questions relating wholly or in part to its internal affairs, including immigration, labor, coastwise traffic, the tariff, debts and all other domestic questions which Congress shall have the right to define further, are wholly within the jurisdiction of the United States; and are not, under the act of adherence, to be construed as being submissible for advisory opinions, judgments or decisions either to the Council under Article 17 of the Covenant, or to the said Court or to any agency thereof, or to the decision or recommendation of any foreign power whatsoever.[2]

291. **The condition that the United States shall participate in the election of judges calls for a full understanding of the proposed method of participation:** This condition would leave the method to the sole discretion of the Department of State. An interpretation whereby the Senate retains a measure of control over the proceedings would necessitate that the Congress of the United States reserve the right to provide by law for the appointment and duties of representatives in the Permanent Court of Arbitration with respect to the nomination

[2] The late Senator Lodge proposed the following Article as part of Resolution 122, 68th Congress, First Session:

> The Court shall be bound by the principle that international law recognizes the authority of the laws of the United States within its own jurisdiction as applied to foreigners or to foreign-owned property therein, whether in time of peace or war.—Article LXVI.

See Annex VI, for Senator Lodge's reservation concerning advisory opinions.

of judges for the Court; and Congress may, in its discretion, provide for the participation of the United States in the election of judges in such manner as is not inconsistent with its policy of non-participation in the political activities of the League. Until such appointments, duties and participation have been provided for by Congress, no person shall represent the United States, nor perform any duties in connection with said Court, as representing the United States; and no citizen of the United States, shall be selected or appointed by any foreign power to perform such duties, except with the consent of the Senate of the United States.

292. **The proposal that the United States pay a fair share of the expenses of the Court requires interpretation to assure protection to the interests of the United States:** It appears from action taken by the Assembly and Council that according to the Financial Regulations of the League which came into force on January 1st, 1923, the Court proposes its own budget which is submitted to the Supervisory Commission of the League; this Commission reports to the Assembly, which body may amend such budget. From each contribution received by the Financial Director of the League of Nations, the Court will be granted a share corresponding to the proportion which its own budget bears to that of the League.[3] The Court is granted advances from the working capital fund of the League. The general proposal, therefore, that the United States pay its fair share as determined and appropriated by Congress would seem to require an interpretation that the Senate understands that such reservation entitles it to an examination of the proposed budget and its apportionment among other signatory

[3] For full account of method of making budget and disbursing funds, see *First Annual Report of the Permanent Court of International Justice,* Series E., No. 1, p. 279.

states, together with the right to propose modifications and to pay the amount appropriated by Congress to the Registrar of the Court. If, however, Mr. Harding's proposal is carried into effect, the fixing of compensation and the apportionment of expenditures also should be transferred to the Court or to some body other than the League.

293. **The condition that the Statute shall not be amended without the consent of the United States does not go far enough:** This proposed condition does not appear to take into consideration sufficiently the extent to which the functions of the Court may be affected by treaties and conventions, under the terms of Article 36 of the Statute, granting to the Court jurisdiction as to matters contained therein; nor does it take into consideration the possibility of altering the powers of the Court through amplification of Article 14 of the Covenant in accordance with which the Court is established. As against these contingencies the proposed condition offers no safeguard and the Senate may deem it necessary to state its interpretation to the effect: (1) That no amendment to the Court Statute shall be adopted by the Assembly and submitted for ratification without the consent of the United States. (2) That the terms of the Statute shall not be altered indirectly through revision by the Assembly or groups of states but its terms shall not be altered in any manner whatsoever except with the consent of all the signatories to the Protocol of Signature; nor shall it be authoritatively interpreted except by the Court. (3) That the Court will not undertake non-judicial duties which may be prescribed for it in treaties without the written consent of the signatories to the Protocol of Signature, and to this end it is believed paragraph 1 of Article 36 of the Statute should be restricted through appropriate amendment to suits between states or to controversies which may be submitted to it under a general or special convention.

294. **A re-statement of the policy of the United States on compulsory arbitration will protect the United States with respect to the optional clause in the Statute:** In view of the fact that the Statute provides for a permanent personnel with no possibility of eliminating nationals of states whose policy toward the United States may be known to be prejudicial,[4] it may be questioned whether a restatement of the policy adopted at the time of ratification of The Hague Convention of 1907, should not be made at the time of adherence to the Court Statute. If so, the proposal submitted by the late Senator Lodge would seem to offer an adequate interpretation: "Before a case in which the United States is concerned

[4] On the matter of the feasibility of submitting cases to a fixed and permanent personnel of judges, Prof. Borchard observes:

> With respect to the effect of a fixed and permanent personnel on the disposition of nations voluntarily to submit questions to judicial settlement, certain facts warrant consideration. In the several cases which the United States has voluntarily submitted to the Permanent Court of Arbitration, we examined with the greatest care the records of the arbitrators nominated in order to determine whether by word or act they could be deemed ever to have harbored a sentiment or doctrinal view unfavorable to the United States. * * *
>
> It was only after we were satisfied of the personal and professional records of the arbitrators nominated, in respect of their disposition toward the United States, that the United States agreed to their appointment as arbitrators in the cases mentioned. Other nations doubtless entertain similar views of such matters. When, therefore, the time comes for the submission of one of our cases to the World Court, is it not clear that the presence on the Court of even a single judge, to whose views, personal or professional, we have reason to object, will deter us from submitting the case? The personnel of the arbitrators or judges is one of the strongest factors in inducing or preventing submission. The longer the Court sits, the more will the views of its judges become established and known. Any nation, therefore, having a national interest in sustaining a different view will hardly be disposed to submit its case to a judge or judges whom it will necessarily regard as biased.

can be submitted to the Court a special agreement must be concluded between the United States and the other parties in interest, defining clearly the matter in dispute, the scope of the powers of the Court, and the periods for the several stages of procedure, and such special agreements on the part of the United States can only be made by the President of the United States by and with the advice and consent of the Senate thereof."

295. **The principle of judicial decision as a method of settling international disputes is not specifically advanced by the Harding-Hughes proposal:** An inseparable obstacle to such advancement exists in the advisory proceedings of the Court, and the extent to which such opinions are being resorted to, threatens to limit every other form of competence. In order to maintain the American principle that such opinions should not be applied to actual controversies nor to an unlimited range of questions, and that such opinions should not be applied to domestic questions, or through the exclusive channels of the Council or Assembly, the conditions now a part of the Harding-Hughes proposal, should be extended to include a condition concerning advisory opinions to the effect that the adherence of the United States should not become effective until such time as (1) The principle of advisory opinions should be restricted to international questions involving constitutional matters or important questions of law not pertaining to actual controversies or which do not involve the rights of parties; (2) until such time as the principle has been extended to states signatory to the Court Statute; and (3) until such time as the authorization and procedure for advisory proceedings are specifically incorporated in the Statute and are no longer dependent upon the Covenant. Such a reservation would bring the foreign juridical policy of the United States into conformity with the principles of the existing Federal

and state juridical policy and also with the proposal made by Mr. Harding.

296. **The development of international law through the jurisprudence of the Court is not specifically furthered by the Harding-Hughes plan:** In order to satisfy the demand in the United States that there be a substantial body of accepted law, codified and expanded to meet the demands which may be made upon the Court for judgments, the conditions, now a part of the Harding-Hughes proposal, should be extended to include the following understanding: (1) That advisory opinions are not to be regarded as precedents establishing principles of law applicable to the adjudication of international disputes and (2) that the signatories to the Protocol establishing the Court of Justice, together with such other states as they may determine to invite, will, within one year, after the adherence of the United States becomes effective, call a conference, for the purpose and in the manner prescribed in the Resolution of Recommendation submitted by the Advisory Committee of Jurists, providing for interstate conferences to carry on the work of the two first Conferences at The Hague; and that such signatories will in good faith provide for the creation of a code of international law to guide the decisions of the Court.

297. **The abolition of war as a method of settling disputes is not recognized in the Harding-Hughes proposals:** On the contrary, they recognize the Covenant which authorizes war as a method of settling international disputes. In order to satisfy the demand in the United States that war be outlawed, the conditions now a part of the Harding-Hughes proposals, should be extended to include the conditions specified under the coalition agreement to the effect, namely:[5] "(1) The

[5] See Chapter XV, p. 176.

immediate adherence of the United States to the Court Protocol, with the Harding-Hughes-Coolidge reservations. (2) Within two years after the adherence by the United States to the Court Protocol, the signatories thereto, including the United States Government, shall formally declare by appropriate governmental action their endorsement of the following basic principles of the outlawry of war, and shall call an international conference of all civilized nations for the purpose of making a general treaty embodying these principles: (a) War between nations shall be outlawed as an institution for the settlement of international controversies by making it a crime under the law of nations. (The question of self-defense against attack or invasion is not involved or affected.) (b) A code of the international law of peace, based upon the outlawing of war and upon equality and justice between all nations, great and small, shall be formulated and adopted. (c) When war is outlawed the Permanent Court of International Justice shall be granted affirmative jurisdiction over international controversies between sovereign nations, as provided for and defined in the code and arising under treaties. (3) Should such signatories within two years after the adherence of the United States fail to make such declaration and join in a conference for the purpose of making such general treaty, the United States may in its discretion withdraw its adherence to said Court Protocol; and, further, should such signatories fail, within five years after the adherence of the United States to said Court Protocol, to make and execute a general treaty embodying in substance the aforesaid principles, the adherence of the United States shall thereupon terminate; but any action of the Court taken in the interim shall remain in full force and effect."

298. The adherence of the United States by the Harding-Hughes plan carries with it the moral obligation to submit

disputes to the Court: This obligation is not legal but it is moral, and were there no such implied obligation, there would be no genuine contribution by precept to the stabilization of peace through juridical settlement. That such obligation will be recognized has been indicated by the correspondence already entered into between the governments of the United States and Great Britain, France, Japan, Norway and the Netherlands, respectively. But the European tendency, to resort to conciliation commissions, arbitral tribunals, or the Council before resorting to the Court, and to differentiate between political and legal questions may operate to place the United States at a disadvantage unless the understanding is set forth at the outset that the United States retains the right to submit to the Permanent Court of Arbitration or other tribunal such matters as it deems to be susceptible to more satisfactory settlement through a tribunal not having a fixed personnel nor an inelastic procedure.[6]

299. **These interpretations and additional proposals for conditions of adherence grant increased protection to the United States against the liability of foreign entanglements:** The guarantees of rights are explicit and specific under these interpretations while the additional conditions contemplate the prevention of war in a manner not comprehended by the Covenant or the Statute, nor in regional security pacts. When accepted, these proposals will increase the judicial opportunities of the Court and will provide a code of law for the decisions of the Court.

[6] The right of the Senate to qualify its consent to ratification by reservations, was established through a reservation to the Jay Treaty of 1794, has been exercised in about seventy cases and has been judicially recognized. (Wright: *The Control of Foreign Relations*, p. 253.)

300. The foregoing interpretations and additions to the Harding-Hughes proposals should be embodied in a compromise resolution: The Harding-Hughes proposals, as submitted to the Senate in the Swanson Resolution, do not express the political judgment of the United States. This Resolution does not express in a Republican measure the views of the Administration; it does not express in a Democratic measure, the will of the Democratic minority; it does not satisfy both wings of the Republican party; it does not meet the demand of the people for the abolition of war; and, finally, it does not reflect the intelligence of 1926 as differentiated from the information of 1923 when the proposal was made. A compromise resolution of reconciliation appears to be inevitable if the act of adherence is to represent the political judgment of the United States.

CHAPTER XX

CONCLUSION

The Republican Party has made two inseparable pledges to the people of the United States concerning its foreign policy. These pledges are part of the Republican National platform and have been endorsed by two presidents of the United States. The fulfillment of these two pledges is, therefore, a political obligation and a political necessity. These pledges are first, to endorse the Permanent Court of International Justice by adherence to the Protocol of Signature; and second to assume no obligations under the Covenant.

To fulfill one pledge without breaking the other presents a dilemma, for there is no doubt that the Court which it is proposed to endorse is the juridical branch of a political institution functioning under the Covenant under which the Republican Administration has pledged itself to assume no obligations. The question is, therefore, in what manner may the two pledges be fulfilled.

The Harding-Hughes proposal, as has been seen, commits the United States to an endorsement and participation not only in the juridical work of the Court, but also to participation in the political affairs of the League. For it should be clearly understood that the Court at The Hague performs its duties under the enacting statute, but its general policy and fiscal policy is determined at Geneva by the Assembly and by the Council of the League of Nations. It appears to be practically impossible for the United States to assume any *administrative* duties with respect to the Court, namely through election of judges or finan-

cial support of the Court, without assuming obligations under the Covenant. There is no condition and no understanding; there is no reservation and no generalization which disposes of the inescapable basic fact that the *administration* of the Court is vested in the League, that its policies are fixed by the Council under Article 14 of the Covenant and that the Court is established in accordance with this Article and any state which participates in any function of the League assumes obligations under the Covenant. However much advocates of peace may seek to escape this fact, it is not for the Senate of the United States to blink its implications. The issue presented by the Harding-Hughes proposal, therefore, involves not solely the keeping of one pledge but of two pledges.

In order to fulfill the first pledge made to the American people, and to advance the cause of peace and justice through judicial decision, there does not seem to be any necessity for the United States to send representatives to Geneva to vote for judges nor to make its contribution to the expenses of the Court. For unless the United States intends to participate in all of the discussions of the League which pertain to the Court, including revisions of the Covenant and Statute, advisory opinions, sanctions, reference to the Court of non-judicial matters and other questions of policy and administration, it is futile to expect any measure of legal control over the court of its adoption. This is a question of grave importance to be decided in all of its implications and ramifications before adherence.

As to the election of judges, these members of the Court are the representatives of the League of Nations and not of the states whose nationals they may be. On this theory, which is responsible for the present method of election, the United States will participate in the election of representatives of the League. It may be objected that should the United States fail to participate in such elections it may have no national on the

bench and therefore will be reluctant to submit cases. To this objection it may be replied, first that since the Statute requires that the Court represent the main civilizations, the obligation is upon the League and not upon the United States to require observance of a League Statute; and to bring to the Court the representatives of different legal systems; and, second, no state may have more than one national during the conduct of a case and Article 31 of the Statute assures to the United States a national on the Court whenever it is a party in interest.

As to the conduct of the financial affairs of the Court through the Financial Regulations adopted by the League wherein the Council passes first upon questions of budget, allocation of funds, pensions and other fiscal matters, and the Assembly then considers the matter; and wherein membership in the League, not signatures to the Statute determine the financial obligation with respect to the Court, it is an unbusiness-like proceeding and, if continued, will require this country to assume financial obligations under the Covenant for it is membership in the League which now determines the assessment. There appears to be no sound reason why the United States should not insist upon fiscal autonomy for the Court wherein the Court itself prepares its budget, allocates the assessment, fixes salaries and pensions and submits the matter to signatory states for their approval, revision or recommendation. This would relieve the United States of *administrative* duties with respect to the League. As to the execution of the sanctions for the judgments of the Court, this also is an administrative matter; and the administrator is the Council; for it may recommend to its own members their application. Voting as members of the Council in favor of their application is equivalent to voting for their execution as individual states. When the United States accepts the administrative duty of electing judges who represent the League, it will inevitably become involved in the execution of the judgments of the Court for whose election

and maintenance through the League it becomes jointly responsible. And should this not occur at the outset, officially and openly it must occur through diplomatic channels, for the principle is inescapable that a state cannot accept certain administrative duties in a political organization and hope to escape the consequences of other political duties performed by that same body.

The control of the general policies of the Court is not vested in the Statute; it is vested in the Covenant. It is by revision of Article 14 of the Covenant, in accordance with which the Court is established, that its functions may be changed. For instance, should the Council desire to make unquestionably mandatory upon the Court the granting of advisory opinions upon its request, or that such opinions should be confidential to the Council, Article 14 of the Covenant may be amended by the Assembly to include such a provision and since the Court is established in accordance with that Article the revised provisions are binding upon the Court. Or, again, should Article 14 of the Covenant be revised to provide that the Court should appoint a Higher Military Command for the enforcement of its decisions by members of the League, as prescribed by the Council under Article 13 of the Covenant, and as set forth in Articles 16 and 17, upon ratification of this amendment as passed by the Assembly by the requisite number of states, the Court would be bound to perform the duty laid upon it by its co-ordinate legislative branch. It is, therefore, futile to expect to protect the United States from changes in the general policies of a Court through a reservation concerning the amendment of an instrument which does not prescribe nor control the policies of the Court; and it is erroneous to believe that the United States will secure itself against secret advisory opinions or unsought advisory opinions affecting its interests, or against mandatory advisory opinions for the Court without restricting the rights of the League under Article 14 of the

Covenant to do as it pleases with the policies of the Court. That such protection should be a condition precedent to adherence and not a subsequent hope requires no argument.

For these and other reasons hereinbefore set forth, the conclusion is reached that the Republican Administration will be fulfilling its pledges to the people of the United States if it adheres solely to the judicial functions of the Court and does not participate in the administrative functions of the League; and if it assumes responsibility only for those matters over which the Court has control and not for those matters over which the League has control. And, *per contra* if the United States does accept administrative duties under the League it will be assuming obligations under the Covenant. In accordance with this view the resolution of adherence, following a proper preamble for affiliation, should provide for the following conditions and understandings:

1. The United States accepts the invitation contained in the Protocol of Signature of adhering to the adjoined Statute for the purpose of submitting to the jurisdiction of the Permanent Court of International Justice such controversies as it may specify in its treaties or in general conventions, or which it deems generally suitable for submission to such Court; reserving the right to resort to the Permanent Court of Arbitration or to any other tribunal, when, in its judgment, that procedure best serves the ends of justice and peace. Whenever it shall have occasion to submit a matter to the Court, the United States will accept the provisions of the Statute as applicable to the conduct of such case, and will in good faith accept the decision of the Court; without, however, recognizing the advisory competence of the Court with respect to any matter submitted without its consent. Should the Court at any time render secret or confidential opinions or be required to render opinions by the Council or do so against the protest of a state not signatory to the Covenant, the United States

will consider such act to be sufficient ground for the withdrawal of its adherence.

2. Such adherence shall take effect only when the Court is granted fiscal autonomy with respect to making its budget and fixing the items therein, and allocating its apportionment among signatory states for their approval or recommendation; assessments to be payable to the Registrar of the Court. For this purpose the Statute should be amended, granting to the Court full fiscal autonomy limited to its own signatories.

3. The United States understands that in adhering to the Protocol of Signature, it assumes no obligations under the Covenant and will, therefore, not participate in the election of judges nor in the execution of sanctions, nor in any administrative function with respect to the Court, now performed or to be performed by the League of Nations; until such time as Congress may authorize the assumption of such duties and prescribe the method of the participation by the United States.

ANNEX I

Summary of Advisory Opinions and Judgments

I. ADVISORY OPINIONS

(1) Workers Delegate from the Netherlands. The question involved in this controversy was whether a state, in nominating workers delegates and advisers to attend International Labor Conferences under Article 389 of the Versailles Treaty is bound to select them upon the recommendation of the labor organization which has the largest membership, or whether it may select them from persons recommended by organizations which, together, represent a larger membership than the one organization. Article 389 of the Treaty of Versailles specifies that such delegates shall be chosen in agreement with the industrial organizations which are most representative of employers or work people.

The facts were that the Netherlands Government had appointed its delegate and advisers to the Third Session of the International Labor Conferences from nominations made by three labor organizations which had agreed, and which together included more members than the single largest organization. This latter organization protested to the International Labor Office against seating the delegate thus selected, claiming for itself this right, as the most representative organization. The Conference, however, seated the delegate with the reservation that his seating was not to be considered a precedent, and passed a resolution requesting the Governing Body of the International Labor Office to obtain, through the Council, an opinion as to the interpretation of Article 389 of the Treaty of Versailles and as to the rules which should be observed by members of the International Labor Organization in order to comply with said Article. The Governing Body, having approved the request, the Director forwarded to the Council a letter, the first part of which embodied the substance of the Resolution, but which concluded with the request for an advisory opinion on the question whether the Netherlands' delegate had been properly nominated.

The Council thereupon submitted to the Court the question "whether the workers delegate for the Netherlands, at the Third Session of the

International Labor Conference was nominated in accordance with the provisions of paragraph 3 of Article 389 of the Treaty of Versailles." The Netherlands Government protested to the League that the formulation of the question was not in accordance with the resolution passed by the Labor Conference. The question was, however, not rectified by the Secretariat, on the plea that the rules of the Court required a definite statement of a matter submitted. The form of the submission being correct, the Court had no authority to enquire into the manner of submission, which involved: (1) A misrepresentation of the action taken by the Labor Conference; and (2) a violation of the terms of Article 4 of the Covenant, in that the Council had considered a matter especially affecting the Netherlands Government, in the absence of a representative of that state.

The Court, therefore, took jurisdiction over the matter. In its opinion it stated that the sole object of the question submitted was to obtain an interpretation of Article 389; and that the act of the Netherlands had been made the subject of the question, solely in order to fix clearly the state of facts. The opinion, delivered on July 31st, 1922, was to the effect that the Netherlands delegate had been nominated in accordance with the Treaty of Versailles, in that the three organizations which together included more members than the single largest organization, were more representative, and had, therefore, a right to nominate the delegate representing the Netherlands. The opinion was transmitted to the Council, which, having taken note, forwarded it to the Director of the International Labor Office, by whom it was accepted.

(2) Conditions of Agricultural Labor. The question involved in this controversy was whether agricultural labor was included within the phrase "industrial life and labor" used in Article 396 of the Treaty of Versailles. The dispute arose under this Article which defines the functions of the International Labor Office; and under Article 427 which lays down the principles covering the subjects to be included in the improvement of labor conditions.

The facts were as follows. The First General Labor Conference, held in Washington, reached certain decisions, respecting labor matters. In accordance therewith, the Conference of 1921 included upon its agenda a discussion of the adaptation of the Washington decisions to agricultural labor. The French Government requested that consideration of agricultural labor be withdrawn from the agenda, chiefly by reason of the unwillingness of France to have discussed regulations concerning the eight-hour day with respect to agriculture. This ques-

tion was subsequently removed from the agenda, but on other questions concerning agricultural labor the Conference affirmed its competence, by vote, and proceeded to adopt certain conventions for the protection of agricultural workers. France thereupon requested the Council, on January 13th, 1922, to obtain an advisory opinion on the competence of the International Labor Organization to deal with questions of agricultural labor. Overruling the objections of the Director of the International Labor Office, who protested that the Governing Body had not been consulted, the Council submitted to the Court the question: "Does the competence of the International Labor Organization extend to the international regulation of the conditions of labor of persons employed in agriculture?"

The opinion, rendered on August 12th, 1922, was in favor of the International Labor Office to the effect that its competence did extend to the international regulation of the conditions of labor of persons employed in agriculture. There were two dissenting opinions: M. Weiss (France) and M. Negulesco (Roumania), but the opinion of the Court as transmitted by the Council was accepted by the Labor Office and by France.

(3) Methods of Agricultural Production. This question was supplemental to the preceding one, and also concerned the competence of the International Labor Office. The facts were as follows: At the General Labor Conference of 1921 a resolution was introduced for the purpose of conducting an inquiry "with a view to organizing and developing effectively agricultural production." As this resolution was somewhat ambiguous, it was suggested that it be submitted to a joint agricultural commission. The appointment of such commission was placed on the agenda of the session of the Governing Body held in January, 1922; on this occasion the French Government protested against the appointment of the Commission, requesting that discussion of the subject be adjourned until the Court had delivered its advisory opinion on the competence of the Labor Organization with respect to agricultural labor. The Governing Body, however, passed a resolution affirming that it would proceed to set up the agricultural commission. The commission had been appointed and was in process of making its studies when the French Government requested the Council to obtain from the Court a supplemental opinion on the subject of the competence of the Labor Organization to examine proposals for the organization of agricultural production. The object of this request was to secure an injunction against research into the conditions of agricultural

labor, particularly unemployment as it might be affected by methods of production.

The Director of the International Labor Office, appearing before the Council, stated that the Labor Organization had no intention of claiming competence on the points raised by France, nevertheless the Council submitted the following question to the Court: "Does the examination of proposals for the organization and development of methods of agricultural production, and of other questions of a like character, fall within the competence of the International Labor Organization?"

The Court, being bound by the form of the question submitted, on the same day that it rendered an opinion refusing to enjoin the Labor Organization from publicly discussing questions of agricultural labor, rendered an opinion in which it did enjoin that Organization from conducting research into methods of agricultural production which involved questions of labor; it refused, however, to extend its opinion to cover "questions of a like character," as being of an indefinite nature. The opinion was transmitted by the Council to the Director of the International Labor Organization and was accepted.

(4) Nationality Decrees in Tunis and Morocco. The question involved in this controversy between Great Britain and France was whether the protection of British subjects in Tunis and Morocco was an international or a domestic matter. The dispute was in no way connected with the Peace Treaties.

The facts were as follows: On November 8th, 1921, the French Government, exercising a protectorate over Tunis and Morocco, published in these two countries under the sovereignty of the Bey of Tunis and the Sultan of Morocco, certain decrees, the effect of which was to confer French nationality upon persons born in those countries of parents also born there, and justiciable before French tribunals. By these decrees the French Government claimed the right to impose the obligations of French nationality upon persons claiming to be British subjects, thereby rendering them liable to French military service.

Failing to obtain satisfaction through diplomatic channels, Great Britain proposed that the dispute be referred to arbitration, under the Franco-British Arbitration Convention of 1903. On refusal of the French Government, Great Britain, under Articles 13 and 15 of the Covenant, on August 11th, 1922, submitted the matter to the Council for adjudication. The Council, however, did not acquire jurisdiction over the merits of the dispute, for France claimed that the matter

constituted a domestic issue and, as such, the Council, under paragraph 8 of Article 15, could not make a recommendation. The question thus raised by the French Government was submitted to the Court for an advisory opinion.

The question for submission was framed in agreement by the parties. The Council submitted to the Court the question of its own competence under Article 15, paragraph 8 and agreed also to request the Court to meet in extraordinary session. In the resolution of submission it was set forth that the two governments agreed if the opinion of the Court should be to the effect that the matter was not solely one for domestic jurisdiction, "the whole dispute will be referred to arbitration or to judicial settlement under conditions to be agreed between the governments."

The Court was of the unanimous opinion, rendered on February 7th, 1923, that the matter was of an international character. The French Government thereupon proposed that the dispute be submitted to the Court on its merits. Great Britain, however, appeared unwilling to do so and the original question submitted for adjudication under Article 13 was not revived before the Council. Diplomatic negotiations were resumed between the two countries and on May 24th, 1923, an amicable settlement was reached. The Court was notified of the agreement.

(5) Autonomy in Eastern Carelia: The matter involved in this question concerned the point whether the Treaty of Dorpat between Russia and Finland and the declaration made by Russia on that occasion, with respect to Eastern Carelia, constituted an engagement of an international character.

The facts of the case were as follows: Finland separated from Russia and regained its independence in 1917. In Eastern Carelia, formerly a part of Finland, a movement developed at the same time, favoring separation from Russia and autonomy. War having broken out between Finland and Russia, Finland assumed protection of certain districts in Eastern Carelian territory, and only returned these districts to Russia in 1920, when negotiations were opened and a peace treaty was concluded at Dorpat. To the Treaty of Dorpat the Soviet Government annexed a Declaration guaranteeing a certain autonomy to the population of Eastern Carelia. The Russian Government did not put into operation the terms of the Declaration, whereupon the Eastern Carelians reopened their contest for self-determination and self-government. Fighting took place, and the Finnish Government appealed to the League of Nations, requesting the Council to appoint a Com-

mission of Inquiry. The Council undertook to bring about conciliation between the parties, and, this having failed, was requested by the Finnish Government to obtain an advisory opinion from the Court.

The following question was accordingly submitted by the Counciil for an advisory opinion: "Do Articles 10 and 11 of the Treaty of Peace between Finland and Russia, signed at Dorpat on October 14th, 1920, and the annexed Declaration of the Russian Delegation regarding the autonomy of Eastern Carelia, constitute engagements of an international character which place Russia under an obligation to Finland as to the carrying out of the provisions contained therein?"

Russia refused to appear before the Court, and the Court, applying a well-known rule of international law, declined to grant an opinion on the question submitted. Instead, on July 23rd, 1923, it rendered an opinion on the competence of the Council under Article 17 of the Covenant since it declared that no state, without its consent, could be compelled to submit its dispute to any form of pacific settlement; that states, not members of the League, are not bound by the Covenant; and the submission of a dispute under the Covenant could only take place by virtue of consent. The opinion was rendered by a divided Court, M. Weiss (France), M. Nyholm (Denmark), M. de Bustamente (Cuba) and M. Altamira (Spain) dissenting.

The opinion appears not to have been altogether acceptable to the League, for the Fourth Assembly requested the Council to pursue its endeavors, and the Council, while noting the opinion of the Court, did not formally accept it in principle. Although, no further effort has been made to bring this particular dispute within the competence of the Council, that body reserves the right to do so.

(6) Eviction of German Settlers from Poland. The question involved in this controversy between Germany and Poland was whether Poland, under the Minority Treaty, had acted in conformity with her international obligations in the expulsion of settlers from lands acquired from Germany under the Treaty of Versailles. Article 12 of the Minority Treaty executed by Poland and the Principal Allied Powers, in pursuance of Article 93 of the Treaty of Versailles, provides that the stipulations of the Treaty, assuring protection of life, liberty and equality before the law to all Polish nationals, shall be placed under the guarantee of the League of Nations; and that any member of the Council may draw the attention of the Council to any infraction or danger of infraction and that the Council may thereupon take such action as may be deemed effective in the circumstances.

The dispute arose as follows: Certain German State lands in West Prussia were transferred to Poland by Germany under the terms of the Peace Treaties. On these lands were 1,565 tenants who had not received from the German Government their *Auflassung,* or certificate of title until after the armistice was signed, although all payments and obligations had been met. There were also 1,216 settlers who had received no such certificate of title, and 760 settlers who had only obtained their final leases after the armistice but the majority had a certificate of title. These three classes of tenants the Polish Government proposed to evict under an agrarian law passed on July 14th, 1920, on the ground that those possessing no certificate of title occupied the ground illegally, and those having received such certificates since the armistice had received them illegally. The settlers, on the contrary, defended their title on the ground that all payments had been completed.

Complaints were made in May, 1921, by the Union of German Farmers to the League, and in October, 1921, by the German Government to the Conference of Ambassadors. The League took no action, and the Conference succeeded in obtaining a delay of a few months from the Polish Government before it would proceed with the planned evictions. In November, 1921, a further complaint made by the Germanic League in Bromberg, Poland, reached the League which also succeeded in securing a theoretical extension of time until May 6th, 1922. During this period, however, expulsions continued, and neither the Council nor a special committee nor the committee of jurists appointed by the Council to study the question was able to reach a conclusion satisfactory to the settlers and acceptable to the Polish Government. By December, 1922, Poland had evicted about one third of the total number of settlers, and questioned the competence of the Council to deal with the matter at all, on the ground that the question had been submitted by a private organization (the Germanic League); that no member of the Council had specifically taken up the matter as prescribed in the procedure for minority complaints; and finally, that the case did not come under the Minority Treaty but under the Treaty of Versailles which it was beyond the competence of the Council to apply.

The Council, however, submitted to the Court in February, 1923, for an advisory opinion the following questions: (a) Did the matters involved come within the competence of the League of Nations, as defined in the Polish Minority Treaty, and (b) should the first question be answered in the affirmative, was the position of the Polish Government in conformity with its international obligations? Although the expul-

sions were continuing, the Council did not request an extraordinary session and the Court took up the question only in August, 1923.

The Court, in its opinion delivered unanimously on September 10th, 1923, held, that the question had been submitted by the Council in accordance with the Minority Treaties, and that the League was, therefore, competent to deal with the matter. As to the action of the Polish Government, it was stated not to be in conformity with the international obligation assumed by that state. Meanwhile, however, not more than two hundred of the 2,781 German settlers originally in question, retained their holdings, the rest having been evicted.

The opinion was sent to the Council and embodied in a resolution which was only in part accepted by Poland; and a further controversy arose as to (1) the measures to be taken to effect a settlement; (2) the right of Poland to obtain judgments in local courts against the remaining settlers and to offer them modified contracts after the original ones had been declared void. In December, 1923, the Council passed a resolution which affected the application of the opinion of the Court in that it stated that just compensation to the settlers might be substituted for re-establishment on their home-lands. A committee was appointed to deal with the matter and on report of the committee the Council in March, 1924, gave the representatives of Brazil, Great Britain, and Italy full power to meet the Polish delegate, and to re-examine and settle the matter.

In June, 1924, the agreement was reached that a sum of 2,700,000 gold francs (about $540,000) was to be divided among 500 settlers. who were able to claim Polish nationality on July 14th, 1920. Should the number of settlers entitled to compensation exceed 530, the Polish Government was to increase the sum proportionately; but should it be established three months after coming into force of the Germano-Polish Convention (then being negotiated at Vienna) that the number of settlers entitled to compensation did not exceed 400, the sum set aside would be reduced by 20%, and should the number not exceed 300, by 35%. The apportionment of the sum was to be effected by an official of the Polish Government who would deal directly with the settlers and whose decisions regarding apportionment were to be final. The Convention above mentioned, was signed on August 30th, 1924, and the Council was notified of the exchange of ratifications and confirmed it by a resolution on June 17th, 1925.

A period of four years elapsed, therefore, between the first complaint and the date for opening a possibility for compensation claims. The claims themselves, under the decision of the Council, are a domes-

tic affair of Poland and will, at the best, be satisfied in the case of one sixth of the expelled settlers. The others remain unprovided for, under this execution by the Council of the advisory opinion of the Court.

(7) Acquisition of Polish Nationality. The matter submitted to the Court was incidental to the main subject of the position of German settlers in the territory acquired by Poland from Germany. The question involved was principally the interpretation of Article 4 of the Polish Minority Treaty, which provides that persons of German nationality who were born in Polish territory of parents habitually resident there, shall be recognized as Polish nationals even if such persons, themselves, were not habitually resident there at the time of coming into force of the Treaty. The ground for dispute was furnished by the fact that in carrying out the above provision, Poland claimed that the actual presence and habitual residence of the parents, at the time of coming into force of the Polish Minority Treaty was necessary for the acquisition of Polish nationality, while Germany claimed that actual residence at the time of birth was sufficient.

A complaint was made in November, 1921, by the Germanic League at Bromberg, requesting relief from the policies pursued by the Polish Government toward German settlers in the matter of acquiring Polish nationality under the foregoing provision and other provisions of the Minority Treaty and the Treaty of Versailles. The Council appointed a committee to consider the complaint, which reported on May 17th, 1922. The report of the Committee was adopted and a copy sent to the Polish Government, with a request to forward information. The information was furnished, but the Polish Government contended that the adjudication of the dispute was not within the competence of the League, inasmuch as Article 4 of the Minority Treaty was not placed under the guarantee of the League. This question was submitted to a committee of jurists which rendered an opinion affirming the competence of the Council. The Polish Government, objecting to this interpretation, entered into direct negotiations with Germany, and the Council held the matter in abeyance until it was informed, in July, 1923, that the negotiations had failed.

The Council accordingly, on July 7th, 1923, passed a resolution requesting an advisory opinion from the Court on the following questions: "(1) Does the question regarding the position of the abovementioned persons, in so far as they may belong to racial or linguistic minorities, arising out of the application by Poland of Article 4 of the

Treaty of June 28th, 1919, between the Principal Allied and Associated Powers and Poland, fall within the competence of the League of Nations under the terms of the said Treaty? (2) If so, does Article 4 of the above mentioned Treaty refer solely to the habitual residence of the parents at the date of birth of the persons concerned, or does it also require the parents to have been habitually resident at the moment when the treaty came into force?"

The Court was of the unanimous opinion, delivered on September 15th, 1923, that the matter was within the competence of the League of Nations; and that Article 4 of the Minority Treaty referred only to the habitual residence of the parents at the date of birth of the persons concerned.

The Council adopted the opinion of the Court and entrusted a *rapporteur* to assist the Polish Government in the examination of the question of its application. Matters arising, not only under Article 4 but also under Article 3 of the Minority Treaty as well as under Article 91 of the Treaty of Versailles, involving domicile and the circumstances necessary for its establishment, were included among those to be examined; and negotiations between Poland and Germany were arranged by the *rapporteur*. These negotiations were opened in February, 1924, at Geneva, but no result having been reached by March, the Council recommended that the President of the Upper Silesian Arbitral Tribunal be invited to preside over further negotiations as a mediator. The negotiations were undertaken in April, 1924, at Vienna, and a convention was drawn up, and signed on August 20th, 1924. The Council was notified of the exchange of ratifications in June, 1925, and the convention is in effect.

(8) The Polish-Czechoslovak Boundary at Jaworzina. The question involved in this controversy was the delimitation of the frontier between Poland and Czechoslovakia, and whether it had been settled finally by a decision of the Conference of Ambassadors on July 28th, 1920, more than three years prior to the submission of the controversy to the Council; and, if so, whether that decision should be applied in its entirety. The question arose under Articles 81 and 87 of the Treaty of Versailles, under which the Principal Allied and Associated Powers and other interested states were to determine the boundaries of the new Czechoslovak state, and under which they were also to determine the boundaries of Poland. The Supreme Council, acting as the representative of these Powers, was entrusted with the task of delimiting these frontiers.

The facts were as follows: On September 27th, 1919, the Supreme Council took a decision authorizing a plebiscite to be held in the disputed territory which involved the districts of Teschen, Orava and Spisz. The position of Jaworzina in the Spisz district was strategic, in that it commanded the only pass over the Carpathian mountains at this important point. The plebiscite was not held, and the parties agreed to accept the settlement of the Supreme Council. The Supreme Council entrusted the Conference of Ambassadors with this task, and the Conference, on July 28th, 1920, adopted a decision defining the boundary line. A delimitation commission was appointed, and empowered to mark out the frontier and propose such modifications as it might consider justified. Poland raised objections to the frontier line decided upon by the Conference on July 28th, 1920, and this body, on December 2nd, 1921, formulated a further decision, granting the two countries the right to make modifications by friendly agreement but specifying that otherwise no such modification was to take place. No agreement having been reached, the Conference of Ambassadors after long and futile discussion referred the matter to the Council of the League in August, 1923, under paragraph 2 of Article 11 of the Covenant, and requested the Council to ask the opinion of the Court. The Council, accordingly, in September, 1923, forwarded the question to the Court with a request for an advisory opinion on the subject whether (1) the question of the delimitation of the Polish-Czechoslovak frontier was still open; (2) to what extent; (3) or was the decision final and only subject to minor modifications on the spot?

The Court delivered its opinion on December 6th, 1923, and stated that the boundary had been finally established by the decision of the Conference of July 28th, 1920, but that the Delimitation Commission was authorized to propose further modifications.

The Council, on December 17th, 1923, adopted the opinion of the Court and requested the Conference of Ambassadors to invite the Delimitation Commission to submit new proposals, in accordance with such opinion. The Delimitation Commission consequently sent its proposals to the Conference in February, 1924, and in March the Conference transmitted them to the Council, which body passed a resolution approving the frontier line and recommended an agreement between the parties for the regulation of frontier traffic. This having been drawn up and signed by Poland and Czechoslovakia on May 6th, 1924, the matter is concluded.

(9) The Jugoslav-Albanian Frontier at Saint Naoum. The ques-

tion involved in this dispute grew out of the boundary line laid down by the Conference of Ambassadors in its decision of November 9th, 1921, in which it had confirmed, with certain modifications, the frontier line of Albania, as established by the Treaty of London in 1913.

The facts were as follows: The Conference appointed a Delimitation Commission to carry into effect its decision of November 9th, 1921, at a time when Jugoslav forces had invaded and occupied Albanian territory and following a period of warfare between the two countries. This Delimitation Commission encountered the difficulties inherent in a situation wherein the parties had resorted to force to settle a dispute. Particular difficulties were encountered in the region of the Monastery of Saint Naoum, on the southern end of Lake Ochrida, for the frontier had, in this district, not been marked out in 1913, and in the absence of such decided boundary line both states claimed the Monastery under the terms of the Treaty of London. The Conference, on December 6th, 1922, decided to acknowledge the claim of Albania. The Jugoslav Government requested a revision of this decision and the question was submitted for further examination to a committee, which failed to reach a conclusion, and also to the juridical committee of the Conference, which was equally unsuccessful.

The Conference, therefore, finally decided to refer the matter to the League of Nations on June 5th, 1924. The questions involved were as follows: "Have the Principal Allied Powers, by the decision of the Conference of Ambassadors of December 6th, 1922, exhausted, in regard to the Serbo-Albanian frontier at the Monastery of Saint Naoum, the mission which was recognized as belonging to them by the Assembly of the League of Nations on October 2nd, 1921? Should the League of Nations consider that the Conference has not exhausted its mission, what solution should be adopted in regard to the question of the Serbo-Albanian frontier at Saint Naoum?" The Council, on June 17th, 1924, decided to request an opinion from the Court on the first question submitted by the Conference.

The Court, in its opinion delivered on September 4th, 1924, stated that the Conference had, by its decision of December 6th, 1922, exhausted its powers, basing this opinion, in part, on the precedent established in the opinion concerning Jaworzina. Moreover, the Court held that the Conference had been justified in taking the position that the boundary at Saint Naoum had not been fixed in 1913, but that this boundary was now definitely fixed by the decision of December 6th, 1922; and the application of Jugoslavia for a revision was stated to have no sound basis.

The Council, on October 3rd, 1924, adopted a report on the opinion of the Court, and transmitted it to the Conference. The Conference, in April 1925, communicated to the parties its decision with regard to the opinion of the Court, leaving unchanged its award of the Monastery to Albania. After receiving this decision, however, Albania and Jugoslavia renewed direct negotiations with the result that an exchange of territories took place, a village south of the Monastery being allotted to Albania and the Monastery itself to Jugoslavia. The Conference of Ambassadors, in sanctioning this exchange, reversed its own decision, the opinion of the Court and the recommendation of the Council; but it appears to have succeeded in finding a satisfactory solution of the matter.

(10) The Exchange of Greek and Turkish Populations: The question involved the right of certain Greek inhabitants of Constantinople to consider themselves established there, and the right of the Turkish government to evict such Greeks. The case arose under Article 2 of the Convention concerning the Exchange of Greek and Turkish Populations, signed at Lausanne, January 30th, 1923. The Convention for the exchange of Greek and Turkish populations provides for a compulsory exchange of the Turkish nationals of Greek orthodox faith, established in Turkey, and of Greek nationals of the Moslem faith, established in Greece. Article 2 of the Convention exempts from such exchange (1) The Greek inhabitants of Constantinople; (2) the Moslem inhabitants of Western Thrace and specifies as follows: "All Greeks who were already established before the 30th October, 1918, within the areas under the Prefecture of the City of Constantinople, as defined by the law of 1912, shall be considered as Greek inhabitants of Constantinople." The supervision of the exchange of population was entrusted, under Article 11 of the Convention, to a Mixed Commission, four members of which represented the parties and three members, chosen by the Council of the League, represented neutral states. The Commission began its functions in September, 1923.

The facts were as follows: In August, 1924, a difference arose between the Greek and Turkish members of the Commission, concerning the meaning of the word "established" in Article 2 of the Convention and the evidence to be furnished by persons claiming to be so established, and exempt from exchange. The Turkish Government considered that the existing law, regarding the registration of all "established" persons, would have to be suspended or modified to con-

form with the view of the Mixed Commission and that such modification was an infringement of the sovereign rights of Turkey. The Mixed Commission was unable to settle the dispute in a manner satisfactory to both the Greek and the Turkish members, and while negotiations were still in progress the Constantinople police on October 18th, and the five following days, proceeded to round up and to deport a number of Greeks who, according to the Turkish view, were subject not only to exchange, having arrived in Constantinople after October 30th, 1918, but whose time-limit had also expired. The Greek Government, holding the opinion that persons thus arrested were not subject to exchange, appealed to the Council under Article 11, paragraph 2 of the Covenant. The Council dealt with the complaint at an extraordinary meeting, and since both parties appeared willing to settle the question peacefully, suggested that the Mixed Commission hold a plenary meeting for such purpose, and that in case of legal difficulties the members of the Commission might either request the parties to lay the matter before the Court, or request an advisory opinion from the Court through the Council. The Commission adopted this latter course and forwarded to the Council its request for an advisory opinion from the Court; and the Council, on December 13th, 1924, submitted the following questions: "What meaning and scope should be attributed to the word 'established' in Article 2 of the Convention of Lausanne of January 30th, 1923, regarding the exchange of Greek and Turkish populations. * * * And what conditions must the persons who are described in Article 2 of the Convention of Lausanne under the name of 'Greek inhabitants of Constantinople' fulfil in order that they may be considered as 'established' under the terms of the Convention and exempt from compulsory exchange?"

The Court, in its opinion, delivered on February 21st, 1925, stated that the word "established" used together with the date of October 30th, 1918, was sufficient to enable the respective states to distinguish between those who are subject to exchange and those who are not; and that all Greek inhabitants of Constantinople residing within the boundaries of the city, as defined by the law of 1912, and having arrived there at a date previous to October 30th, 1918, and having had, prior to that date, the intention of residing there, are definitely exempt from exchange.

The opinion of the Court was noted by the Council and forwarded to the Mixed Commission on February 25th, 1925. In conformity with the terms of the opinion, an agreement was drawn up between Greece and Turkey, regulating the application of the interpretation of the

term "established," the return of unjustly expelled individuals, the disposal of property of those rightfully expelled, and other such questions.

(11) Polish Postal Service in Danzig: The question involved in this controversy concerned the right of the Polish Government to establish, in the Free City of Danzig, a postal service with letter boxes bearing the Polish insignia; and whether the decisions of the High Commissioner in respect thereto were final and binding. The question arose under Article 104 of the Treaty of Versailles which provided that the subsequent agreement, to be negotiated by the Principal Allied Powers between Poland and the Free City of Danzig, should ensure to Poland, among other rights, the control and administration of postal telegraphic and telephone communications between Poland and the *Port* of Danzig. This right was confirmed subsequently in the Treaty of Paris, signed November 9th, 1920, and in the Agreement of Warsaw, signed October 24th, 1921. Article 29 of the Treaty of Paris provides as follows: "to establish in the Port of Danzig a post, telegraph and telephone service communicating directly with Poland."

The controversy was the outcome of a series of disputes concerning the application of Article 29 of the Treaty of Paris, as to the meaning of "direct communications," the right of Poland to obtain the necessary buildings, the sphere of activity of the Polish postal service and similar questions. A building on the Heveliusplatz was ultimately assigned to Poland, to be used for telegraph, telephone and postal service and the service was to begin in January, 1925. In preparation for this undertaking on January 5th, 1925, letter boxes bearing Polish inscriptions were set up on the streets of Danzig. The Senate of Danzig protested to the High Commissioner that Polish postal service should be confined to the building on the Heveliusplatz and restricted to the transport of mail to and from the Polish authorities in Danzig. The Polish Commissioner-General in Danzig, on the contrary, asserted that Poland had a right to a complete postal service, including letter boxes and postmen, and claimed as a sphere of activity a section of the Free City, as marked on a plan annexed to a decision of High Commissioner Haking, concerning the ownership of railways. Poland claimed that this map indicated that part of the Free City, which answered the term "port of Danzig." High Commissioner MacDonnell on February 2nd, 1925, rendered a decision favorable to the Danzig contention, basing his view on a previous decision rendered by High Commissioner Haking on May 25th, 1922, which had specified that the Polish postal service

must go by direct route from the one place selected on the territory of Danzig, to the place or places selected in Poland. Poland appealed to the League for a revision of this decision, claiming that High Commissioner Haking had, on August 30th, 1922, interpreted his own previous decision of May 25th, 1922, which interpretation differed from the present one, applied by High-Commissioner MacDonnell. The Council on March 13th, 1925, decided to submit to the Court for an advisory opinion the following questions: "(1) Is there in force a decision of General Haking which decides * * * the points at issue regarding the Polish postal service, and, if so, does such decision prevent reconsideration by the High Commissioner or the Council of all or any of the points in question? (2) If the questions, set out at (a) and (b) below have not been finally decided by General Haking: (a) Is the Polish postal service at the Port of Danzig restricted to operations which can be performed entirely within its premises in the Heveliusplatz, or is it entitled to set up letter boxes and collect and deliver postal matter outside those premises? (b) Is the use of the said service confined to Polish authorities and officials, or can it be used by the public?"

The Court, called in extraordinary session, met in May, 1925, and delivered an opinion according to which: (1) there is not in force any decision of High Commissioner Haking which decided the point at issue; (2) Poland is entitled to have a complete postal service within the port of Danzig, and is not restricted to operations in the building on the Heveliusplatz; and (3) the use of the service is open to the public.

But the Court observed that the delimitation of the Port of Danzig was a necessary preliminary to the application of the above opinion. Poland and Danzig held contrasting views on the definition of the Port of Danzig, but the Court was not requested to give an opinion on this subject. Instead, the Council, on June 11th, 1925, appointed a committee of four experts to fix the limits of the port. The committee delimited the port to include part of the town of Danzig, as a species of economic *Hinterland* for the harbor. It has been left open to agreement between the parties how postal matters shall be delivered to Polish authorities outside the port, as delimited; and the committee has recommended that in case no such agreement can be reached, the whole boundary should be reconsidered. Danzig protested to the Council against the conclusions of the committee, but the Council having accepted such solution, there is now a duplication of postal service in the greater part of the Free City.

11a. Request for an opinion in the matter of the Oecumenical Patriarch: This question involved an interpretation of the Convention for the exchange of Greek and Turkish populations, signed at Lausanne, January 30th, 1925, and the question whether the institution of the Patriarchate was exempt from the provisions of the Convention.

The facts were as follows: The Mixed Commission for the Exchange of Greek and Turkish populations found that the Oecumenical Patriarch, Monseigneur Constantin Araboglou, was subject to exchange in his capacity as a private individual, but it hesitated to take a decision regarding his expulsion as provided in the Convention, by reason of his position as Oecumenical Patriarch. The Turkish authorities hereupon requested the Patriarch to leave Constantinople and had him conveyed to the frontier. The Greek Government protested against this action to the League, under paragraph 2 of Article 11 of the Covenant, claiming that Turkey had violated a decision of the Mixed Commission. The Turkish Government, however, took the position that the expulsion of the Patriarch was a domestic matter and under the jurisdiction of the Mixed Commission, in accordance with which the Government claimed to have acted. Turkey, therefore, refused to appear before the Council. The Council, notwithstanding the refusal of Turkey, considered the matter in March, 1925, and decided to request the Court to give an advisory opinion regarding the competence of the Council to deal with the appeal of Greece. The Court informed the parties concerned of the date fixed for the submission of their cases. To this communication the Turkish Government replied that, having denied the jurisdiction of the Council in this matter, it was also unable to accept the invitation of the Court.

Before the matter was taken up by the Court, however, the Greek Government notified the Council that an agreement had been reached with the Turkish Government, and that, therefore, Greece wished to withdraw its appeal made in February, 1925. The Court was duly notified and the question was removed from its calendar.

12. Advisory opinion requested in the matter of the interpretation of paragraph 2 of Article 3 of the Treaty of Lausanne: This question involves an interpretation of Article 3 of paragraph 2 of the Lausanne Treaty, which provides that: "The frontier between Turkey and Iraq shall be laid down in friendly arrangement to be concluded between Turkey and Great Britain within nine months. In the event of no agreement being reached between the two Governments

within the time mentioned, the dispute shall be referred to the Council of the League of Nations." Each of the parties placed an interpretation favorable to its own interests on the words "frontier between Turkey and Iraq," Great Britain claiming that by a frontier line was meant one coinciding with the northern boundary of the Vilayet of Mosul, while Turkey asserted that the southern boundary of the Vilayet was implied.

The facts were as follows: The friendly agreement, as provided for in the Lausanne Treaty, was not reached and, on request of Great Britain, the Council, in accordance with the Treaty of Lausanne, undertook to settle the matter in August, 1924. The parties recognized the competence of the Council to define the frontier (Turkey under Article 15 of the Covenant and Great Britain under the Lausanne Treaty) and, for this purpose, a committee of three members was appointed to study the situation on the spot, make a report and submit recommendations. But when the Council, in September, 1925, reopened discussions with a view to basing a decision on the report of the Committee, it appeared that the difference in interpretation still existed and that Turkey, while recognizing the competence of the Council to decide a frontier, did not recognize its competence to determine the allocation of Mosul. In other words, Turkey is prepared to recognize the boundary decided upon by the Council, if it coincides approximately with the southern boundary of the Mosul Vilayet.

In connection with this disavowal by the Turkish Government there arose, however, the question of the right of Turkey, as an interested party, to take part in the vote of the Council. Turkey claimed such right under a declaration made by Lord Curzon during the Lausanne Conference, the Council however held that the right of Turkey to vote depended on the Article of the Covenant under which the matter was to be dealt with; for under Article 15 a unanimous vote excluding the votes of the parties is necessary, whereas under Article 11 a recommendation may be made by a majority. The Council, therefore, decided to submit the following question to the Court for an advisory opinion: (1) What is the character of the decision to be taken by the Council in virtue of Article 3, paragraph 2 of the Treaty of Lausanne? (2) Must the decision be unanimous or may it be taken by a majority? (3) May the representatives of the interested parties take part in the vote?

The Court has not been requested to give an opinion on the question which has prevented agreement between Great Britain and Turkey, namely, whether the frontier between Turkey and Iraq is in any way bound by the northern or southern boundary of the Vilayet of Mosul,

or whether such frontier may be drawn at any place which the parties or the Council may decide upon.

The Court began the consideration of the question on October 26th, 1925. The British Government has a national on the Court and its representative has presented arguments to the effect that the nature of the decision which the Council is to make is arbitral, and may, therefore, be taken by a majority, and consequently the parties may not take part in the vote. The Turkish Government has no national on the Court and has sent no representative to present arguments on its behalf, taking the position that the Council alone, under the Treaty, is authorized to deal with the matter and therefore Turkey will recognize only that body.

II. JUDGMENTS OF THE COURT

Judgment No. 1. The S. S. "Wimbledon." The question involved in this case was whether Germany had the right, under the terms of the Treaty of Versailles, to refuse passage, through the Kiel Canal, to the S. S. "Wimbledon" laden with ammunition for Poland which state was then at war with Russia; or whether Germany might exercise the sovereign right of neutrality.

The dispute arose under Article 380 of the Treaty of Versailles which provides that "the Kiel Canal and its approaches shall be maintained free and open to vessels of commerce and of war of all nations at peace with Germany on terms of entire equality." Article 386 stipulates that in the event of any violation of the Articles relating to the Kiel Canal, as to their interpretation, any interested Power can appeal to the jurisdiction instituted for the purpose by the League of Nations. This provision established the jurisdiction of the Court.

The facts were that on January 28th, 1919, during the war between Russia and Poland, the French Government chartered an English vessel, the S. S. "Wimbledon," for the purpose of transporting ammunition to the aid of Poland. On March 21st, 1921, the vessel arrived at the entrance to the Kiel Canal *en route* to Danzig. The German Government refused passage to the ship on the ground that it had aboard war materials for Poland; that the Treaty of Peace between Poland and Russia had not been ratified; and that the German Government had declared its neutrality and published a decree prohibiting the transit of war materials destined for either country. The French Government protested that this was in violation of the Treaty as France and Poland were at peace with Germany. On April 1st, after a delay of eleven days, the vessel proceeded by another route, and the action of Ger-

many became the subject of an active correspondence between the Conference of Ambassadors, to which the French Government referred the matter, and Germany. On January 16th, 1923, the Principal Allied Powers, acting jointly, but not in the name of the Conference of Ambassadors, requested that the Court render a judgment (whether Germany accepted or rejected the jurisdiction of the Court) on the question whether the German authorities wrongfully refused on March 21st, 1921, free access to the Kiel Canal of the S. S. "Wimbledon"; and if so that the German Government shall make reparation. The French Government placed the loss sustained by the delay at 174,081.86 francs, together with interest at 6% from March 20th, 1921, the day prior to the refusal of passage. The Polish Government made application to intervene which the Court granted on the ground that, as provided for in Article 63, the construction of a convention was a question which affected states other than those concerned as parties. Upon notification from the Court of Justice, the German Government accepted its jurisdiction, and, in accordance with Article 31 of the Court Statute, Germany designated M. Schücking as the national judge to sit with the Court in the case.

The Court, in its judgment rendered on August 7th, 1923, held that the Kiel Canal constituted an international waterway and was open without restriction to all countries at peace with Germany; and that the Treaty of Versailles constituted a limitation upon the right of neutrality. Germany was, therefore, ordered to pay to France a compensation amounting to 140,740.35 francs, with interest at 6% from the date of judgment. Three dissenting opinions were submitted, namely by M. Anzilotti, M. Huber and the German national judge, M. Schücking. The German Government appears to have asked the guarantee committee of the Reparation Commission for its consent to the payment of these damages, and received a reply in the negative, which was communicated to the Court on December 6th, 1923.

Judgments No. 2 and 5. The Mavrommatis Concessions. The question concerned primarily concessions granted in Palestine to a Greek subject, by the former Turkish Government and their validity under the present British mandate; and secondarily the right of a state to appeal to the Court on behalf of one of its citizens, under the British Mandate for Palestine.

The facts were as follows: M. Mavrommatis, a Greek subject, concluded, in 1914, with the Turkish authorities, a contract for the construction of electric railways and for the supply of drinking water in

Jerusalem. This contract was signed and in effect, when the war prevented its immediate execution. A similar contract for the city of Jaffa was signed in 1916, but, under the terms of a new Turkish law, needed an imperial *firman,* which confirmation it did not receive. When Palestine was placed under British Mandate after the war, M. Mavrommatis, in 1921, addressed himself to the Colonial Office for recognition of his concessions. Meanwhile, however, the Colonial Office granted certain concessions to a M. Rutenberg, which partly coincided with those of M. Mavrommatis. In 1922, M. Mavrommatis requested protection from his Government and, in 1923, after signature of the Lausanne Treaty the Greek Government undertook negotiations on the basis of the Protocol relating to Concessions annexed to such Treaty. This Protocol provides that concessions granted by the Ottoman Government and entered into before October 29th, 1914, are maintained (Article 1); that the provisions are to be put into conformity with the new economic conditions (Article 4); and that beneficiaries under such contracts which they have not, on the date of the Protocol, begun to put into operation, cannot claim readaptation, but they may have the contracts dissolved on request made six months from the coming into force of the Treaty of Lausanne; in such case the concessionary is entitled to an indemnity (Article 6). As regards territories detached from Turkey, the state which acquires them assumes also the rights and obligations of Turkey toward the nationals of other states (Article 9).

The negotiations between Greece and Great Britain continued for a year without result; finally, on May 13th, 1924, the Greek Government applied to the Court for a judgment, under Article 26 of the Palestine Mandate, which provides that any dispute between the mandatory and another member of the League of Nations relating to the interpretation or the application of the provisions of the Mandate if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice.

The Greek Government asserted that M. Mavrommatis had, since 1920, been wrongfully refused recognition of his claims and that, therefore, the British Government should make due reparations to M. Mavrommatis. The Greek application was transmitted to Great Britain, and the British Government, in reply, submitted a preliminary case, questioning the jurisdiction of the Court, basing its contention on the following facts: (1) The dispute concerned an individual and not a state; (2) diplomatic negotiations, which should be preliminary to submission of a case to the Court, had not been exhausted: (3) Article 26 of the Mandate provided that the dispute must relate to the interpre-

tation or application of the Mandate, with which provisions the present dispute did not appear to comply.

The Court dealt first with the question concerning its own competence and in its judgment delivered on August 30th, 1924, held as follows: (1) While the dispute did primarily concern individual interests, the Greek Government had taken up the case on behalf of its subject and, therefore, the dispute was one between Great Britain in its capacity of mandatory to Palestine, and the Greek Government. (2) In the opinion of the Court, the negotiations undertaken by Greece on behalf of M. Mavrommatis, in 1922 and 1923, had been in the nature of diplomatic negotiations. (3) As regards the application of the Mandate, the Court held that, under Article 11 of the Mandate Great Britain was to exercise its powers to provide for ownership and control of the national resources of the country, subject to any international obligations accepted by Great Britain. The Jerusalem Concessions granted to M. Mavrommatis by the Turkish Government, before October 29th, 1914, were acknowledged, in effect, to constitute such international obligation under Article 1 of the Lausanne Concessions Protocol; but the Jaffa Concessions having been concluded after that date did not constitute such an obligation. Therefore, the Court held that it had jurisdiction over the merits of the case as concerned the Jerusalem Concessions but sustained the British objection concerning the Jaffa Concessions. Judges Finlay, Moore, Oda, de Bustamente and Pessoa dissented from this judgment.

The Court, having reserved examination of the Mavrommatis Jerusalem Concessions on the merits of the case, had the following claims before it: Great Britain asserted that the concessions of M. Mavrommatis were invalid, and should not be recognized under the Concessions Protocol of Lausanne; however should the Court not uphold this contention the British Government claimed that (1) no breach of international obligation had been committed under Article 11 of the Mandate; (2) the contracts had not been in operation at the time of the signature of the Concessions Protocol, as provided in Article 6 of that instrument, and, therefore, no claim could be made for the readaptation of the concession, under Article 4; (3) but M. Mavrommatis might under Article 6, request that the contracts be dissolved; (4) in such case, however, the indemnity claimed was unreasonable. Greece, in reply, claimed that: (1) The concessions had been put into operation and were therefore entitled to readaptation; (2) that if Great Britain were unwilling to allow readaptation, it must buy out the concessions; (3) a compensation of £121,045, together with 6% interest from July

20th, 1923, to the date of the judgment should be paid to M. Mavrommatis, as indemnity for the losses sustained; (4) a special indemnity should be paid, to be fixed under Article 3 of the Lausanne Concessions Protocol, which Article provides for the settlement of such claims.

The Court on August 30th, 1924, in its fifth judgment, held that: (1) The concessions were valid, British evidence to the contrary having proved insufficient. (2) In granting concessions to M. Rutenberg, which concessions partly overlapped those of M. Mavrommatis, Great Britain had acted contrary to its international obligations; but (3) since no expropriation of the Mavrommatis Concessions actually took place in favor of M. Rutenberg, M. Mavrommatis had suffered no loss which would justify a claim for compensation; and, finally, M. Mavrommatis had full right to claim a readaptation of this contract, in accordance with Article 4 of the Lausanne Concessions Protocol. Both the British and the Greek national judges concurred in this decision, there being but one dissenting vote, that of M. Altamira.

Judgments 3 and 4. Treaty of Neuilly, Article 179. These judgments concerned the interpretation of paragraph 4 of the Annex to Section IV of Part IX of the Treaty of Neuilly, concluded between the Allied Powers and Bulgaria. The paragraph in question provides that: "All property, rights and interests of Bulgarian nationals within the territory of any Allied or Associated Power, * * * may be charged by that Allied or Associated Power * * * with payment of amounts due in respect of claims by the nationals of that Allied or Associated Power with regard to their property, rights and interests, * * * and with payment of claims growing out of acts committed by the Bulgarian Government or by any Bulgarian authorities since October 11th, 1915, and before that Allied or Associated Power entered into the war. The amount of such claims may be assessed by an arbitrator appointed by M. Gustav Ador." * * *

The facts were as follows: Under the terms of the above provision, the arbitrator was duly appointed; the Bulgarian Government claimed, however, that he had no competence as regards claims concerning acts committed outside of Bulgarian territory and claims concerning personal damages. The Greek Government, desiring to enforce such claims, disagreed; and the arbitrator suggested that the governments submit the question to the Court. In March, 1924, an agreement was drawn up in which the parties requested the Court to determine the precise meaning of the disputed article, and particularly the following questions: "(1) Does the text above quoted authorize claims for acts

committed even outside Bulgarian territory as constituted before October 11th, 1915, in particular in districts occupied by Bulgaria after her entry into the war? (2) Does the text above quoted authorize claims for damages incurred by claimants not only as regards their property, rights and interests, but also as regards their person, arising out of ill-treatment, deportation, internment or other similar acts?" The Court was requested to sit as a Chamber of Summary Procedure.

The Court, complying with the request, and sitting as a Chamber of Summary Procedure, with Judges Loder, Weiss and Huber as members, delivered a judgment on September 12th, 1924. The judgment undertook to interpret the expression "acts committed," and stated that such expression referred in this instance to acts contrary to the law of nations, and thus involving an obligation to make reparations, whether committed outside of Bulgarian territory or not; but that the reparation to be paid for such claims was included in the total fixed sum of reparations to be paid by Bulgaria.

On November 27th, 1924, the Greek Government requested the Court to give an interpretation of its judgment of September 12th, particularly in regard to the existence of Bulgarian property in Greece which might be used to realize sums awarded by the arbitrator; the possibility of liquidating Bulgarian property in Greece for the purpose of realizing such sums; and the right of Greece to request from the Reparation Commission a redistribution between the Allied Powers of the total sum of the reparations imposed upon Bulgaria. Bulgaria was notified of this request and communicated its observations to the Court. The Court sitting as a Chamber of Summary Procedure, delivered its fifth judgment on March 26th, 1925, wherein it declined to fulfill the Greek request, on the ground that the request went beyond an interpretation of the questions involved in the judgment of September 12th.

Judgment No. 6. German interests in Upper Silesia. The question concerned primarily the right of Poland to expropriate a nitrate factory and several large rural estates in Polish-Upper Silesia; and secondly, the jurisdiction of the Court. Such expropriations are governed by Articles 6–22 of the Germano-Polish Convention with regard to Upper Silesia, signed at Geneva, May 15th, 1922. Under the provisions of this Convention, Poland may in conformity with Articles 92 and 297 of the Treaty of Versailles expropriate industrial plants which on April 15th, 1922, were the property of German nationals, if the Upper Silesian Mixed Commission approves of such expropriation as a measure indispensable to the exploitation of the plant. Poland may

also expropriate the rural property of such German nationals who have no right to retain their domicile in Poland on condition that such estate exceeds 100 hectares. For purposes of such expropriations German nationals are defined by the Treaty of Versailles, and provisions are made for notification for the submission of disputes and questions to the Upper Silesian Mixed Tribunal; and finally, Article 23 provides for submission of disputes relating to the interpretation and application of the terms of the Convention, to the Permanent Court of International Justice.

The facts were as follows: in accordance with the provisions of the Convention, Poland proceeded with certain expropriations. Included among these was the expropriation of a nitrate factory at Chorzow, which Poland held to be the property of the German State, and not of individual German nationals; but which is claimed to have been owned by German private persons. Notice was served also on several proprietors of large rural estates of the intention of the Polish government to expropriate their properties.

The German Government, in May, 1925, submitted to the Court an appeal based on Article 23 of the Germano-Polish Convention, regarding the expropriation of the Chorzow nitrate factory and the threatened expropriation of large rural estates. It claimed that the action of Poland in neither case was in conformity with the Germano-Polish Convention. Poland was notified of the appeal and submitted a counter case questioning the jurisdiction of the Court, in that (1) the expropriation of the Chorzow factory falls under Article 256 of the Versailles Treaty governing property of the German State, and not under the Articles of the Germano-Polish Convention which are subject to the jurisdiction of the Court; (2) the appeal concerning agricultural estates was premature, since the Polish Government was still investigating the German claims in this matter.

The Court, on August 25th, 1925, dealt with the preliminary question concerning its jurisdiction and decided as follows: (1) The question relating to the Chorzow factory implied whether or not Poland had acted in conformity with the Articles of the Germano-Polish Convention relating to expropriation; these articles are subject to the jurisdiction of the Court. (2) In the matter of the rural estates, notice of intended expropriation furnished sufficient ground for Germany to desire a final determination by the Court without waiting for the result of the investigation by the Polish Government. The Court, therefore, reserved jurisdiction over the case on its merits, the only dissenting opinion being that of the Polish national judge; and the final judgment is pending.

ANNEX II

Statute

FOR THE PERMANENT COURT OF INTERNATIONAL JUSTICE PROVIDED FOR BY ARTICLE 14 OF THE COVENANT OF THE LEAGUE OF NATIONS

Art. 1. A Permanent Court of International Justice is hereby established in accordance with Article 14 of the Covenant of the League of Nations. This Court shall be in addition to the Court of Arbitration organized by the Conventions of The Hague of 1899 and 1907, and to the special Tribunals of Arbitration to which States are always at liberty to submit their disputes for settlement.

CHAPTER I

Organization of the Court

Art. 2. The Permanent Court of International Justice shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are juris-consults of recognized competence in international law.

Art. 3. The Court shall consist of fifteen members: eleven judges and four deputy-judges. The number of judges and deputy-judges may hereafter be increased by the Assembly, upon the proposal of the Council of the League of Nations, to a total of fifteen judges and six deputy-judges.

Art. 4. The members of the Court shall be elected by the Assembly and by the Council from a list of persons nominated by the national groups in the Court of Arbitration, in accordance with the following provisions.

In the case of Members of the League of Nations not represented in the Permanent Court of Arbitration, the list of candidates shall be drawn up by national groups appointed for this purpose by their

Governments under the same conditions as those prescribed for members of the Permanent Court of Arbitration by Article 44 of the Convention of The Hague of 1907 for the pacific settlement of international disputes.

Art. 5. At least three months before the date of the election, the Secretary-General of the League of Nations shall address a written request to the Members of the Court of Arbitration belonging to the States mentioned in the Annex to the Covenant or to the States which join the League subsequently, and to the persons appointed under paragraph 2 of Article 4, inviting them to undertake, within a given time, by national groups, the nomination of persons in a position to accept the duties of a member of the Court.

No group may nominate more than four persons, not more than two of whom shall be of their own nationality. In no case must the number of candidates nominated be more than double the number of seats to be filled.

Art. 6. Before making these nominations, each national group is recommended to consult its Highest Court of Justice, its Legal Faculties and Schools of Law, and its National Academies and national sections of International Academies devoted to the study of Law.

Art. 7. The Secretary-General of the League of Nations shall prepare a list in alphabetical order of all the persons thus nominated. Save as provided in Article 12, paragraph 2, these shall be the only persons eligible for appointment.

The Secretary-General shall submit this list to the Assembly and to the Council.

Art. 8. The Assembly and the Council shall proceed independently of one another to elect, firstly the judges, then the deputy-judges.

Art. 9. At every election, the electors shall bear in mind that not only should all the persons appointed as members of the Court possess the qualifications required, but the whole body also should represent the main forms of civilization and the principal legal systems of the world.

Art. 10. Those candidates who obtain an absolute majority of votes in the Assembly and in the Council shall be considered as elected.

In the event of more than one national of the same Member of the League being elected by the votes of both the Assembly and the Council, the eldest of these only shall be considered as elected.

Art. 11. If, after the first meeting held for the purpose of the election, one or more seats remain to be filled, a second and, if necessary, a third meeting shall take place.

ART. 12. If, after the third meeting, one or more seats still remain unfilled, a joint conference consisting of six members, three appointed by the Assembly and three by the Council, may be formed, at any time, at the request of either the Assembly or the Council, for the purpose of choosing one name for each seat still vacant, to submit to the Assembly and the Council for their respective acceptance.

If the Conference is unanimously agreed upon any person who fulfils the required conditions, he may be included in its list, even though he was not included in the list of nominations referred to in Articles 4 and 5.

If the joint conference is satisfied that it will not be successful in procuring an election, those members of the Court who have already been appointed shall, within a period to be fixed by the Council, proceed to fill the vacant seats by selection from among those candidates who have obtained votes either in the Assembly or in the Council.

In the event of an equality of votes among the judges, the eldest judge shall have a casting vote.

ART. 13. The members of the Court shall be elected for nine years.

They may be re-elected.

They shall continue to discharge their duties until their places have been filled. Though replaced, they shall finish any cases which they may have begun.

ART. 14. Vacancies which may occur shall be filled by the same method as that laid down for the first election. A member of the Court elected to replace a member whose period of appointment had not expired will hold the appointment for the remainder of his predecessor's term.

ART. 15. Deputy-judges shall be called upon to sit in the order laid down in a list.

This list shall be prepared by the Court and shall have regard firstly to priority of election and secondly to age.

ART. 16. The ordinary Members of the Court may not exercise any political or administrative function. This provision does not apply to the deputy-judges except when performing their duties on the Court.

Any doubt on this point is settled by the decision of the Court.

ART. 17. No Member of the Court can act as agent, counsel or advocate in any case of an international nature. This provision only applies to the deputy-judges as regards cases in which they are called upon to exercise their functions on the Court.

No Member may participate in the decision of any case in which he has previously taken an active part, as agent, counsel or advocate for

one of the contesting parties, or as a Member of a national or international Court, or of a Commission of inquiry, or in any other capacity.

Any doubt on this point is settled by the decision of the Court.

Art. 18. A member of the Court cannot be dismissed unless, in the unanimous opinion of the other members, he has ceased to fulfil the required conditions.

Formal notification thereof shall be made to the Secretary-General of the League of Nations, by the Registrar.

This notification makes the place vacant.

Art. 19. The members of the Court, when engaged on the business of the Court, shall enjoy diplomatic privileges and immunities.

Art. 20. Every member of the Court shall, before taking up his duties, make a solemn declaration in open Court that he will exercise his powers impartially and conscientiously.

Art. 21. The Court shall elect its President and Vice-President for three years; they may be re-elected.

It shall appoint its Registrar.

The duties of Registrar of the Court shall not be deemed incompatible with those of Secretary-General of the Permanent Court of Arbitration.

Art. 22. The seat of the Court shall be established at The Hague.

The President and Registrar shall reside at the seat of the Court.

Art. 23. A session of the Court shall be held every year.

Unless otherwise provided by rules of Court, this session shall begin on the 15th of June, and shall continue for so long as may be deemed necessary to finish the cases on the list.

The President may summon an extraordinary session of the Court whenever necessary.

Art. 24. If, for some special reason, a member of the Court considers that he should not take part in the decision of a particular case, he shall so inform the President.

If the President considers that for some special reason one of the members of the Court should not sit on a particular case, he shall give him notice accordingly.

If in any such case the member of the Court and the President disagree, the matter shall be settled by the decision of the Court.

Art. 25. The full Court shall sit except when it is expressly provided otherwise.

If eleven judges cannot be present, the number shall be made up by calling on deputy-judges to sit.

If, however, eleven judges are not available, a quorum of nine judges shall suffice to constitute the Court.

Art. 26. Labor cases, particularly cases referred to in Part XIII (Labor) of the Treaty of Versailles and the corresponding portion of the other Treaties of Peace, shall be heard and determined by the Court under the following conditions:

The Court will appoint every three years a special chamber of five judges, selected so far as possible with due regard to the provisions of Article 9. In addition, two judges shall be selected for the purpose of replacing a judge who finds it impossible to sit. If the parties so demand, cases will be heard and determined by this chamber. In the absence of any such demand, the Court will sit with the number of judges provided for in Article 25. On all occasions the judges will be assisted by four technical assessors sitting with them, but without the right to vote, and chosen with a view to insuring a just representation of the competing interests.

If there is a national of one only of the parties sitting as a judge in the chamber referred to in the preceding paragraph, the President will invite one of the other judges to retire in favor of a judge chosen by the other party in accordance with Article 31.

The technical assesssors shall be chosen for each particular case in accordance with rules of procedure under Article 30 from a list of "Assessors for Labor cases" composed of two persons nominated by each Member of the League of Nations and an equivalent number nominated by the Governing Body of the Labor Office. The Governing Body will nominate, as to one half, representatives of the workers, and as to one half, representatives of employers from the list referred to in Article 412 of the Treaty of Versailles and the corresponding Articles of the other Treaties of Peace.

In Labor cases the International Labor Office shall be at liberty to furnish the Court with all relevant information, and for this purpose the Director of that Office shall receive copies of all the written proceedings.

Art. 27. Cases relating to transit and communications, particularly cases referred to in Part XII (Ports, Waterways and Railways) of the Treaty of Versailles and the corresponding portions of the other Treaties of Peace shall be heard and determined by the Court under the following conditions:

The Court will appoint every three years a special chamber of five judges, selected so far as possible with due regard to the provisions of Article 9. In addition, two judges shall be selected for the purpose of

replacing a judge who finds it impossible to sit. If the parties so demand, cases will be heard and determined by this chamber. In the absence of any such demand, the Court will sit with the number of judges provided for in Article 25. When desired by the parties or decided by the Court, the judges will be assisted by four technical assessors sitting with them, but without the right to vote.

If there is a national of one only of the parties sitting as a judge in the chamber referred to in the preceding paragraph, the President will invite one of the other judges to retire in favor of a judge chosen by the other party in accordance with Article 31.

The technical assessors shall be chosen for each particular case in accordance with rules of procedure under Article 30 from a list of "Assessors for Transit and Communications cases" composed of two persons nominated by each Member of the League of Nations.

Art. 28. The special chambers provided for in Articles 26 and 27 may, with the consent of the parties to the dispute, sit elsewhere than at The Hague.

Art. 29. With a view to the speedy despatch of business, the Court shall form annually a chamber composed of three judges who, at the request of the contesting parties, may hear and determine cases by summary procedure.

Art. 30. The Court shall frame rules for regulating its procedure. In particular, it shall lay down rules for summary procedure.

Art. 31. Judges of the nationality of each contesting party shall retain their right to sit in the case before the Court.

If the Court includes upon the Bench a judge of the nationality of one of the parties only, the other party may select from among the deputy-judges a judge of its nationality, if there be one. If there should not be one, the party may choose a judge, preferably from among those persons who have been nominated as candidates as provided in Articles 4 and 5.

If the Court includes upon the Bench no judge of the nationality of the contesting parties, each of these may proceed to select or choose a judge as provided in the preceding paragraph.

Should there be several parties in the same interest, they shall, for the purpose of the preceding provisions, be reckoned as one party only. Any doubt upon this point is settled by the decision of the Court.

Judges selected or chosen as laid down in paragraphs 2 and 3 of this Article shall fulfil the conditions required by Articles 2, 16, 17, 20, 24 of this Statute. They shall take part in the decision on an equal footing with their colleagues.

ART. 32. The judges shall receive an annual indemnity to be determined by the Assembly of the League of Nations upon the proposal of the Council. This indemnity must not be decreased during the period of a judge's appointment.

The President shall receive a special grant for his period of office, to be fixed in the same way.

The Vice-Presidents, judges and deputy-judges, shall receive a grant for the actual performance of their duties, to be fixed in the same way.

Traveling expenses incurred in the performance of their duties shall be refunded to judges and deputy-judges who do not reside at the seat of the Court.

Grants due to judges selected or chosen as provided in Article 31 shall be determined in the same way.

The salary of the Registrar shall be decided by the Council upon the proposal of the Court.

The Assembly of the League of Nations shall lay down, on the proposal of the Council, a special regulation fixing the conditions under which retiring pensions may be given to the personnel of the Court.

ART. 33. The expenses of the Court shall be borne by the League of Nations, in such a manner as shall be decided by the Assembly upon the proposal of the Council.

CHAPTER II

Competence of the Court

ART. 34. Only States or Members of the League of Nations can be parties in cases before the Court.

ART. 35. The Court shall be open to the Members of the League and also to States mentioned in the Annex to the Covenant.

The conditions under which the Court shall be open to other States shall, subject to the special provisions contained in treaties in force, be laid down by the Council, but in no case shall such provisions place the parties in a position of inequality before the Court.

When a State which is not a Member of the League of Nations is a party to a dispute, the Court will fix the amount which that party is to contribute toward the expenses of the Court.

ART. 36. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in Treaties and Conventions in force.

The Members of the League of Nations and the States mentioned in

the Annex to the Covenant may, either when signing or ratifying the protocol to which the present Statute is adjoined, or at a later moment, declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other Member or State accepting the same obligation, the jurisdiction of the Court in all or any of the classes of legal disputes concerning:

(*a.*) The interpretation of a Treaty.

(*b.*) Any question of International Law.

(*c.*) The existence of any fact which, if established, would constitute a breach of an international obligation.

(*d.*) The nature or extent of the reparation to be made for the breach of an international obligation.

The declaration referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain Members or States, or for a certain time.

In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

Art. 37. When a treaty or convention in force provides for the reference of a matter to a tribunal to be instituted by the League of Nations, the Court will be such tribunal.

Art. 38. The Court shall apply:

1. International conventions, whether general or particular, establishing rules expressly recognized by the contesting States;

2. International custom, as evidence of a general practice accepted as law;

3. The general principles of law recognized by civilized nations;

4. Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono,* if the parties agree thereto.

CHAPTER III

Procedure

Art. 39. The official languages of the Court shall be French and English. If the parties agree that the case shall be conducted in French, the judgment will be delivered in French. If the parties agree that the case shall be conducted in English, the judgment will be delivered in English.

In the absence of an agreement as to which language shall be employed, each party may, in the pleadings, use the language which it prefers; the decision of the Court will be given in French and English. In this case the Court will at the same time determine which of the two texts shall be considered as authoritative.

The Court may, at the request of the parties, authorize a language other than French or English to be used.

Art. 40. Cases are brought before the Court, as the case may be, either by the notification of the special agreement or by a written application addressed to the Registrar. In either case the subject of the dispute and the contesting parties must be indicated.

The Registrar shall forthwith communicate the application to all concerned.

He shall also notify the Members of the League of Nations through the Secretary-General.

Art. 41. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to reserve the respective rights of either party.

Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and the Council.

Art. 42. The parties shall be represented by Agents.

They may have the assistance of Counsel or Advocates before the Court.

Art. 43. The procedure shall consist of two parts: written and oral.

The written proceedings shall consist of the communication to the judges and to the parties of cases, counter-cases and, if necessary, replies; also all papers and documents in support.

These communications shall be made through the Registrar, in the order and within the time fixed by the Court.

A certified copy of every document produced by one party shall be communicated to the other party.

The oral proceedings shall consist of the hearing by the Court of witnesses, experts, agents, counsel and advocates.

Art. 44. For the service of all notices upon persons other than the agents, counsel and advocates, the Court shall apply direct to the Government of the State upon whose territory the notice has to be served.

The same provision shall apply whenever steps are to be taken to procure evidence on the spot.

Art. 45. The hearing shall be under the control of the President or,

in his absence, of the Vice-President; if both are absent, the senior judge shall preside.

Art. 46. The hearing in Court shall be public, unless the Court shall decide otherwise, or unless the parties demand that the public be not admitted.

Art. 47. Minutes shall be made at each hearing, and signed by the Registrar and the President.

These minutes shall be the only authentic record.

Art. 48. The Court shall make orders for the conduct of the case, shall decide the form and time in which each party must conclude its arguments, and make all arrangements connected with the taking of evidence.

Art. 49. The Court may, even before the hearing begins, call upon the agents to produce any document or to supply any explanations. Formal note shall be taken of any refusal.

Art. 50. The Court may, at any time, intrust any individual, body, bureau, commission or other organization that it may select, with the task of carrying out an inquiry or giving an expert opinion.

Art. 51. During the hearing any relevant questions are to be put to the witnesses and experts under the conditions laid down by the Court in the rules of procedure referred to in Article 30.

Art. 52. After the Court has received the proofs and evidence within the time specified for the purpose, it may refuse to accept any further oral or written evidence that one party may desire to present unless the other side consents.

Art. 53. Whenever one of the parties shall not appear before the Court, or shall fail to defend his case, the other party may call upon the Court to decide in favor of his claim.

The Court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and law.

Art. 54. When, subject to the control of the Court, the agents, advocates and counsel have completed their presentation of the case, the President shall declare the hearing closed.

The Court shall withdraw to consider the judgment.

The deliberations of the Court shall take place in private and remain secret.

Art. 55. All questions shall be decided by a majority of the judges present at the hearing.

In the event of an equality of votes, the President or his deputy shall have a casting vote.

ART. 56. The judgment shall state the reasons on which it is based. It shall contain the names of the judges who have taken part in the decision.

ART. 57. If the judgment does not represent in whole or in part the unanimous opinion of the judges, dissenting judges are entitled to deliver a separate opinion.

ART. 58. The judgment shall be signed by the President and by the Registrar. It shall be read in open Court, due notice having been given to the agents.

ART. 59. The decision of the Court has no binding force except between the parties and in respect of that particular case.

ART. 60. The judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party.

ART. 61. An application for revision of a judgment can be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence.

The proceedings for revision will be opened by a judgment of the Court expressly recording the existence of the new fact, recognizing that it has such a character as to lay the case open to revision, and declaring the application admissible on this ground.

The Court may require previous compliance with the terms of the judgment before it admits proceedings in revision.

The application for revision must be made at latest within six months of the discovery of the new fact.

No application for revision may be made after the lapse of ten years from the date of the sentence.

ART. 62. Should a State consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene as a third party. It will be for the Court to decide upon this request.

ART. 63. Whenever the construction of a convention to which States other than those concerned in the case are parties is in question, the Registrar shall notify all such States forthwith.

Every State so notified has the right to intervene in the proceedings; but if it uses this right, the construction given by the judgment will be equally binding upon it.

ART. 64. Unless otherwise decided by the Court, each party shall bear its own costs.

ANNEX III

Rules of Court

Preamble

The Court,
By virtue of Article 30 of its Statute,
Adopts the present Rules:

CHAPTER I. *The Court*

HEADING I. *Constitution of Court*

SECTION A. *Judges and Assessors.*

Art. 1. Subject to the provisions of Article 14 of the Statute, the term of office of judges and deputy-judges shall commence on January 1st of the year following their election.

Art. 2. Judges and deputy-judges elected at an earlier session of the Assembly and of the Council of the League of Nations shall take precedence respectively over judges and deputy-judges elected at a subsequent session. Judges and deputy-judges elected during the same session shall take precedence according to age. Judges shall take precedence over deputy-judges.

National judges chosen from outside the Court, under the terms of Article 31 of the Statute, shall take precedence after deputy-judges in order of age.

The list of deputy-judges shall be prepared in accordance with these principles.

The Vice-President shall take his seat on the right of the President. The other Members of the Court shall take their seats to the right and left of the President in the order laid down above.

Art. 3. Deputy-judges whose presence is necessary shall be summoned in the order laid down in the list referred to in the preceding Article, that is to say, each of them will be summoned in rotation throughout the list.

Should a deputy-judge be so far from the seat of the Court that, in

the opinion of the President, a summons would not reach him in sufficient time, the deputy-judge next on the list shall be summoned; nevertheless, the judge to whom the summons should have been addressed shall be called upon, if possible, on the next occasion that the presence of a deputy-judge is required.

A deputy-judge who has begun a case shall be summoned again, if necessary out of his turn, in order to continue to sit in the case until it is finished.

Should a deputy-judge be summoned to take his seat in a particular case as a national judge, under the terms of Article 31 of the Statute, such summons shall not be regarded as coming within the terms of the present Article.

Art. 4. In cases in which one or more parties are entitled to choose a judge *ad hoc* of their nationality, the full Court may sit with a number of judges exceeding eleven.

When the Court has satisfied itself, in accordance with Article 31 of the Statute, that there are several parties in the same interest and that none of them has a judge of its nationality upon the bench, the Court shall invite them, within a period to be fixed by the Court, to select by common agreement a deputy judge of the nationality of one of the parties, should there be one; or, should there not be one, a judge chosen in accordance with the principles of the above-mentioned Article.

Should the parties have failed to notify the Court of their selection or choice when the time limit expires, they shall be regarded as having renounced the right conferred upon them by Article 31.

Art. 5. Before entering upon his duties, each member of the Court or judge summoned to complete the Court, under the terms of Article 31 of the Statute, shall make the following solemn declaration in accordance with Article 20 of the Statute:

"I solemnly declare that I will exercise all my powers and duties as a judge honorably and faithfully, impartially and conscientiously."

A special public sitting of the Court may, if necessary, be convened for this purpose.

At the public inaugural sitting held after a new election of the whole Court the required declaration shall be made first by the President, secondly by the Vice-President, and then by the remaining judges in the order laid down in Article 2.

Art. 6. For the purpose of applying Article 18 of the Statute, the President, or if necessary the Vice-President, shall convene the judges and deputy-judges. The member affected shall be allowed to furnish

explanations. When he has done so the question shall be discussed and a vote shall be taken, the member in question not being present. If the members present are unanimously agreed, the Registrar shall issue the notification prescribed in the above-mentioned Article.

ART. 7. The President shall take steps to obtain all information which might be helpful to the Court in selecting technical assessors in each case. With regard to the questions referred to in Article 26 of the Statute, he shall, in particular, consult the Governing Body of the International Labour Office.

The asessors shall be appointed by an absolute majority of votes, either by the Court or by the special Chamber which has to deal with the case in question.

ART. 8. Assessors shall make the following solemn declaration at the first sitting of the Court at which they are present:

"I solemnly declare that I will exercise my duties and powers as an assessor honorably and faithfully, impartially and conscientiously, and that I will scrupulously observe all the provisions of the Statute and of the Rules of Court."

SECTION B. *The Presidency.*

ART. 9. The election of the President and Vice-President shall take place at the end of the ordinary session immediately before the normal termination of the period of office of the retiring President and Vice-President.

After a new election of the whole Court, the election of the President and Vice-President shall take place at the commencement of the following session. The President and Vice-President elected in these circumstances shall take up their duties on the day of their election. They shall remain in office until the end of the second year after the year of their election.

Should the President or the Vice-President cease to belong to the Court before the expiration of their normal term of office, an election shall be held for the purpose of appointing a substitute for the unexpired portion of their term of office. If necessary, an extraordinary session of the Court may be convened for this purpose.

The elections referred to in the present Article shall take place by secret ballot. The candidate obtaining an absolute majority of votes shall be declared elected.

ART. 10. The President shall direct the work and administration of the Court; he shall preside at the meetings of the full Court.

ART. 11. The Vice-President shall take the place of the President,

should the latter be unable to be present, or, should he cease to hold office, until the new President has been appointed by the Court.

ART. 12. The President shall reside within a radius of ten kilometres from the Peace Palace at the Hague.

The main annual vacation of the President shall not exceed three months.

ART. 13. After a new election of the whole Court and until such time as the President and Vice-President have been elected, the judge who takes precedence according to the order laid down in Article 2, shall perform the duties of President.

The same principle shall be applied should both the President and the Vice-President be unable to be present, or should both appointments be vacant at the same time.

SECTION C. *The Chambers.*

Art. 14. The members of the Chambers constituted by virtue of Articles 26, 27 and 29 of the Statute shall be appointed at a meeting of the full Court by an absolute majority of votes, regard being had for the purposes of this selection to any preference expressed by the judges, so far as the provisions of Article 9 of the Statute permit.

The substitutes mentioned in Articles 26 and 27 of the Statute shall be appointed in the same manner. Two judges shall be chosen to replace any member of the Chamber for summary procedure who may be unable to sit.

The election shall take place at the end of the ordinary session of the Court, and the period of appointment of the members elected shall commence on January 1st of the following year.

Nevertheless, after a new election of the whole Court the election shall take place at the beginning of the following session. The period of appointment shall commence on the date of election and shall terminate, in the case of the Chamber referred to in Article 29 of the Statute, at the end of the same year and, in the case of the Chambers referred to in Articles 26 and 27 of the Statute, at the end of the second year after the year of election.

The Presidents of the Chambers shall be appointed at a sitting of the full Court. Nevertheless, the President of the Court shall, *ex officio*, preside over any Chamber of which he may be elected a member; similarly, the Vice-President of the Court shall, *ex officio*, preside over any Chamber of which he may be elected a member, provided that the President is not also a member.

Art. 15. The special Chambers for labour cases and for communications and transit cases may not sit with a greater number than five judges.

Except as provided in the second paragraph of the preceding Article, the composition of the Chamber for summary procedure may not be altered.

Art. 16. Deputy-judges shall not be summoned to complete the special Chambers or the Chamber for summary procedure, unless sufficient judges are not available to complete the number required.

SECTION D. *The Registry.*

Art. 17. The Court shall select its Registrar from amongst candidates proposed by members of the Court.

The election shall be by secret ballot and by a majority of votes. In the event of an equality of votes, the President shall have a casting vote.

The Registrar shall be elected for a term of seven years commencing on January 1st of the year following that in which the election takes place. He may be re-elected.

Should the Registrar cease to hold his office before the expiration of the term above-mentioned, an election shall be held for the purpose of appointing a successor.

Art. 18. Before taking up his duties, the Registrar shall make the following declaration at a meeting of the full Court:

"I solemnly declare that I will perform the duties conferred upon me as Registrar of the Permanent Court of International Justice in all loyalty, discretion and good conscience."

The other members of the Registry shall make a similar declaration before the President, the Registrar being present.

Art. 19. The Registrar shall reside within a radius of ten kilometres from the Peace Palace at The Hague.

The main annual vacation of the Registrar shall not exceed two months.

Art. 20. The staff of the Registry shall be appointed by the Court on proposals submitted by the Registrar.

Art. 21. The Regulations for the Staff of the Registry shall be adopted by the President on the proposal of the Registrar, subject to subsequent approval by the Court.

Art. 22. The Court shall determine or modify the organization of the Registry upon proposals submitted by the Registrar. On the proposal of the Registrar, the President shall appoint the member of the

Registry who is to act for the Registrar in his absence or, in the event of his ceasing to hold his office, until a successor has been appointed.

Art. 23. The registers kept in the archives shall be so arranged as to give particulars with regard to the following points amongst others:

1. For each case or question, all documents pertaining to it and all action taken with regard to it in chronological order; all such documents shall bear the same file number and shall be numbered consecutively within the file;

2. All decisions of the Court in chronological order, with references to the respective files;

3. All advisory opinions given by the Court in chronological order, with references to the respective files;

4. All notifications and similar communications sent out by the Court, with references to the respective files.

Indexes kept in the archives shall comprise:

1. A card index of names with necessary references;

2. A card index of subject matter with like references.

Art. 24. During hours to be fixed by the President the Registrar shall receive any documents and reply to any enquiries, subject to the provisions of Article 38 of the present Rules and to the observance of professional secrecy.

Art. 25. The Registrar shall be the channel for all communications to and from the Court.

The Registrar shall ensure that the date of despatch and receipt of all communications and notifications may readily be verified. Communications and notifications sent by post shall be registered. Communications addressed to the official representatives or to the agents of the parties shall be considered as having been addressed to the parties themselves. The date of receipt shall be noted on all documents received by the Registrar, and a receipt bearing this date and the number under which the document has been registered shall be given to the sender, if a request to that effect be made.

Art. 26. The Registrar shall be responsible for the archives, the accounts and all administrative work. He shall have the custody of the seals and stamps of the Court. He shall himself be present at all meetings of the full Court and either he, or a person appointed to represent him with the approval of the Court, shall be present at all sittings of the various Chambers; he shall be responsible for drawing up the minutes of the meetings.

He shall further undertake all duties which may be laid upon him by the present Rules.

The duties of the Registry shall be set forth in detail in a List of Instructions to be submitted by the Registrar to the President for his approval.

HEADING 2.—*Working of the Court.*

Art. 27. In the year following a new election of the whole Court the ordinary annual session shall commence on the fifteenth of January.

If the day fixed for the opening of a session is regarded as a holiday at the place where the Court is sitting, the session shall be opened on the working day following.

Art. 28. The list of cases shall be prepared and kept up to date by the Registrar under the responsibility of the President. The list for each session shall contain all questions submitted to the Court for an advisory opinion and all cases in regard to which the written proceedings are concluded in the order in which the documents submitting each question or case have been received by the Registrar. If in the course of a session, a question is submitted to the Court or the written proceedings in regard to any case are concluded, the Court shall decide whether such question or case shall be added to the list for that session.

The Registrar shall prepare and keep up to date extracts from the above list showing the cases to be dealt with by the respective Chambers.

The Registrar shall also prepare and keep a list of cases for revision.

Art. 29. During the sessions the dates and hours of sittings shall be fixed by the President.

Art. 30. If at any sitting of the full Court it is impossible to obtain the prescribed quorum, the Court shall adjourn until the quorum is obtained.

Art. 31. The Court shall sit in private to deliberate upon the decision of any case or on the reply to any question submitted to it.

During the deliberation referred to in the preceding paragraph, only persons authorized to take part in the deliberation and the Registrar shall be present. No other person shall be admitted except by virtue of a special decision taken by the Court, having regard to exceptional circumstances.

Every member of the Court who is present at the deliberation shall state his opinion together with the reasons on which it is based.

The decision of the Court shall be based upon the conclusions adopted after final discussion by a majority of the members.

Any member of the Court may request that a question which is to be voted upon shall be drawn up on precise terms in both the official languages and distributed to the Court. A request to this effect shall be complied with.

CHAPTER II. *Procedure*

HEADING I.—*Contentious Procedure*

SECTION A. *General Provisions.*

Art. 32. The rules contained under this heading shall in no way preclude the adoption by the Court of such other rules as may be jointly proposed by the parties concerned, due regard being paid to the particular circumstances of each case.

Art. 33. The Court shall fix time limits in each case by assigning a definite date for the completion of the various acts of procedure, having regard as far as possible to any agreement between the parties.

The Court may extend time limits which it has fixed. It may likewise decide in certain circumstances that any proceeding taken after the expiration of a time limit shall be considered as valid.

If the Court is not sitting the powers conferred upon it by this article shall be exercised by the President, subject to any subsequent decision of the Court.

Art. 34. All documents of the written proceedings submitted to the Court shall be accompanied by not less than thirty printed copies certified correct. The President may order additional copies to be supplied.

SECTION B. *Procedure before the Court and before the special Chambers.*

(*Articles 26 and 27 of the Statute*)

I. Institution of Proceedings.

Art. 35. When a case is brought before the Court by means of a special agreement, the latter, or the document notifying the Court of the agreement, shall mention the addresses selected at the seat of the Court to which notices and communications intended for the respective parties are to be sent.

In all other cases in which the Court has jurisdiction, the application shall include, in addition to an indication of the subject of the dispute and the names of the parties concerned, a succinct statement of facts, an indication of the claim and the address selected at the seat of the Court to which notices and communications are to be sent.

Should proceedings be instituted by means of an application, the first document sent in reply thereto shall mention the address selected at the seat of the Court to which subsequent notices and communications in regard to the case are to be sent.

Should the notice of a special agreement, or the application, contain a request that the case be referred to one of the special Chambers mentioned in Articles 26 or 27 of the Statute, such request shall be complied with, provided that the parties are in agreement.

Similarly, a request to the effect that technical assessors be attached to the Court, in accordance with Article 27 of the Statute, or that the case be referred to the Chamber for summary procedure shall also be granted; compliance with the latter request is, however, subject to the condition that the case does not refer to any of the questions indicated in Articles 26 and 27 of the Statute.

Art. 36. The Registrar shall forthwith communicate to all members of the Court special agreements or applications which have been notified to him.

II. Written Proceedings.

Art. 37. Should the parties agree that the proceedings shall be conducted in French or in English, the documents constituting the written procedure shall be submitted only in the language adopted by the parties.

In the absence of an agreement with regard to the language to be employed, documents shall be submitted in French or in English.

Should the use of a language other than French or English be authorized, a translation into French or into English shall be attached to the original of each document submitted.

The Registrar shall not be bound to make translations of documents submitted in accordance with the above rules.

In the case of voluminous documents the Court, or the President if the Court is not sitting, may, at the request of the party concerned, sanction the submission of translations of portions of documents only.

Art. 38. The Court, or the President, if the Court is not sitting, may, after hearing the parties, order the Registrar to hold the cases

and counter-cases of each suit at the disposal of the Government of any State which is entitled to appear before the Court.

Art. 39. In cases in which proceedings have been instituted by means of a special agreement, the following documents may be presented in the order stated below, provided that no agreement to the contrary has been concluded between the parties:

a case, submitted by each party within the same limit of time;

a counter-case, submitted by each party within the same limit of time;

a reply, submitted by each party within the same limit of time.

When proceedings are instituted by means of an application, failing any agreement to the contrary between the parties, the documents shall be presented in the order stated below:

the case by the applicant;

the counter-case by the respondent;

the reply by the applicant;

the rejoinder by the respondent.

Art. 40. Cases shall contain:

1. a statement of the facts on which the claim is based;
2. a statement of law;
3. a statement of conclusions;
4. a list of the document in support; these documents shall be attached to the case.

Counter-cases shall contain:

1. the affirmation or contestation of the facts stated in the case;
2. a statement of additional facts, if any;
3. a statement of law;
4. conclusions based on the facts stated; these conclusions may include counter-claims, in so far as the latter come within the jurisdiction of the Court;
5. a list of the document in support; these documents shall be attached to the counter-case.

Art. 41. Upon the termination of the written proceedings the President shall fix a date for the commencement of the oral proceedings.

Art. 42. The Registrar shall forward to each of the members of the Court, a copy of all documents in the case as he receives them.

III. Oral Proceedings.

Art. 43. In the case of a public sitting, the Registrar shall publish

in the Press all necessary information as to the date and hour fixed.

Art. 44. The Registrar shall arrange for the interpretation from French into English and from English into French of all statements, questions and answers which the Court may direct to be so interpreted.

Whenever a language other than French or English is employed, either under the terms of the third paragraph of Article 39 of the Statute or in a particular instance, the necessary arrangements for translation into one of the two official languages shall be made by the party concerned. In the case of witnesses or experts who appear at the instance of the Court, these arrangements shall be made by the Registrar.

Art. 45. The Court shall determine in each case whether the representatives of the parties shall address the Court before or after the production of the evidence; the parties shall, however, retain the right to comment on the evidence given.

Art. 46. The order in which the agents, advocates or counsel, shall be called upon to speak shall be determined by the Court, failing an agreement between the parties on the subject.

Art. 47. In sufficient time before the opening of the oral proceedings, each party shall inform the Court and the other parties of all evidence which it intends to produce, together with the names, Christian names, description and residence of witnesses whom it desires to be heard.

It shall further give a general indication of the point or points to which the evidence is to refer.

Art. 48. The Court may, subject to the provisions of Article 44 of the Statute, invite the parties to call witnesses, or may call for the production of any other evidence on points of fact in regard to which the parties are not in agreement.

Art. 49. The Court, or the President should the Court not be sitting, shall, at the request of one of the parties or on its own initiative, take the necessary steps for the examination of witnesses out of Court.

Art. 50. Each witness shall make the following solemn declaration before giving his evidence in Court:

"I solemnly declare upon my honour and conscience that I will speak the truth, the whole truth and nothing but the truth."

Art. 51. Witnesses shall be examined by the representatives of the parties under the control of the President. Questions may be put to them by the President and afterwards by the judges.

Art. 52. The indemnities of witnesses who appear at the instance of the Court shall be paid out of the funds of the Court.

Art. 53. Any report or record of any enquiry carried out at the request of the Court, under the terms of Article 50 of the Statute, and reports furnished to the Court by experts, in accordance with the same Article, shall be forthwith communicated to the parties.

Art. 54. A record shall be made of the evidence taken. The portion containing the evidence of each witness shall be read over to him and approved by him.

As regards the remainder of the oral proceedings, the Court shall decide in each case whether verbatim records of all or certain portions of them shall be prepared for its own use.

Art. 55. The minutes mentioned in Article 47 of the Statute shall in particular include:

1. the names of the judges;
2. the names of the agents, advocates and counsel;
3. the names, Christian names, description and residence of witnesses heard;
4. a specification of other evidence produced;
5. any declaration made by the parties;
6. all decisions taken by the Court during the hearing.

Art. 56. Before the oral proceedings are concluded each party may present his bill of costs.

IV. Interim Protection.

Art. 57. When the Court is not sitting, any measures for the preservation in the meantime of the respective rights of the parties shall be indicated by the President.

Any refusal by the parties to conform to the suggestions of the Court or of the President, with regard to such measures, shall be placed in record.

V. Intervention.

Art. 58. An application for permission to intervene, under the terms of Article 62 of the Statute, must be communicated to the Registrar at latest before the commencement of the oral proceedings.

Nevertheless the Court may, in exceptional circumstances, consider an application submitted at a later stage.

Art. 59. The application referred to in the preceding Article shall contain:

1. a specification of the case in which the applicant desires to intervene;

2. a statement of law and of fact justifying intervention;

3. a list of the documents in support of the application; these documents shall be attached.

Such application shall be immediately communicated to the parties, who shall send to the Registrar any observations which they may desire to make within a period to be fixed by the Court, or by the President, should the Court not be sitting.

Art. 60. Any State desiring to intervene, under the terms of Article 63 of the Statute, shall inform the Registrar in writing at latest before the commencement of the oral proceedings.

The Court, or the President if the Court is not sitting, shall take the necessary steps to enable the intervening State to inspect the documents in the case, in so far as they relate to the interpretation of the convention in question, and to submit its observations thereon to the Court.

VI. Agreement.

Art. 61. If the parties conclude an agreement regarding the settlement of the dispute and give written notice of such agreement to the Court before the close of the proceedings, the Court shall officially record the conclusion of the agreement.

Should the parties by mutual agreement notify the Court in writing that they intend to break off proceedings, the Court shall officially record the fact and proceedings shall be terminated.

VII. Judgment.

Art. 62. The judgment shall contain:

1. the date on which it is pronounced;
2. the names of the judges participating;
3. the names and style of the parties;
4. the names of the agents of the parties;
5. the conclusions of the parties;
6. the matters of fact;
7. the reasons in point of law;
8. the operative provisions of the judgment;
9. the decision, if any, referred to in Article 64 of the Statute.

The opinions of judges who dissent from the judgment, shall be attached thereto should they express a desire to that effect.

Art. 63. After having been read in open Court the text of the judgment shall forthwith be communicated to all parties concerned and to the Secretary-General of the League of Nations.

Art. 64. The judgment shall be regarded as taking effect on the day on which it is read in open Court, in accordance with Article 58 of the Statute.

Art. 65. A collection of the judgments of the Court shall be printed and published under the responsibility of the Registrar.

VIII. Revision.

Art. 66. Application for revision shall be made in the same form as the application mentioned in Article 40 of the Statute.

It shall contain:

1. the reference to the judgment impeached;
2. the fact on which the application is based;
3. a list of the documents in support; these documents shall be attached.

It shall be the duty of the registrar to give immediate notice of an application for revision to the other parties concerned. The latter may submit observations within a time limit to be fixed by the Court, or by the President should the Court not be sitting.

If the judgment impeached was pronounced by the full Court, the application for revision shall also be dealt with by the full Court. It the judgment impeached was pronounced by one of the Chambers mentioned in Articles 26, 27 or 29 of the Statute, the application for revision shall be dealt with by the same Chamber. The provisions of Article 13 of the Statute shall apply in all cases.

If the Court, under the third paragraph of Article 61 of the Statute, makes a special order rendering the admission of the application conditional upon previous compliance with the terms of the judgment impeached, this condition shall be immediately communicated to the applicant by the Registrar, and proceedings in revision shall be stayed pending receipt by the Registrar of proof of previous compliance with the original judgment and until such proof shall have been accepted by the Court.

SECTION C. *Summary Procedure.*

Art. 67. Except as provided under the present section the rules for

procedure before the full Court shall apply to summary procedure.

Art. 68. Upon receipt by the Registrar of the document instituting proceedings in a case which, by virtue of an agreement between the parties, is to be dealt with by summary procedure, the President shall convene as soon as possible the Chamber referred to in Article 29 of the Statute.

Art. 69. The proceedings are opened by the presentation of a case by each party. These cases shall be communicated by the Registrar to the members of the Chamber and to the opposing party.

The cases shall contain reference to all evidence which the parties may desire to produce.

Should the Chamber consider that the cases do not furnish adequate information, it may, in the absence of an agreement to the contrary between the parties, institute oral proceedings. It shall fix a date for the commencement of the oral proceedings.

At the hearing, the Chamber shall call upon the parties to supply oral explanations. It may sanction the production of any evidence mentioned in the cases.

If it is desired that witnesses or experts whose names are mentioned in the case should be heard, such witnesses or experts must be available to appear before the Chamber when required.

Art. 70. The judgment is the judgment of the Court rendered in the Chamber of summary procedure. It shall be read at a public sitting of the Chamber.

HEADING 2.—*Advisory Procedure.*

Art. 71. Advisory opinions shall be given after deliberation by the full Court.

The opinions of dissenting judges may, at their request, be attached to the opinion of the Court.

Art. 72. Questions upon which the advisory opinion of the Court is asked shall be laid before the Court by means of a written request, signed either by the President of the Assembly or the President of the Council of the League of Nations, or by the Secretary-General of the League under instructions from the Assembly or the Council.

The request shall contain an exact statement of the question upon which an opinion is required, and shall be accompanied by all documents likely to throw light upon the question.

Art. 73. The Registrar shall forthwith give notice of the request

for an advisory opinion to the members of the Court, and to the Members of the League of Nations, through the Secretary-General of the League, and to the States mentioned in the Annex to the Covenant.

Notice of such request shall also be given to any international organizations which are likely to be able to furnish information on the question.

Art. 74. Any advisory opinion which may be given by the Court and the request in response to which it was given shall be printed and published in a special collection for which the Registrar shall be responsible.

HEADING 3.—*Errors*

Art. 75. The Court, or the President if the Court is not sitting, shall be entitled to correct an error in any order, judgment or opinion, arising from a slip or accidental omission.

Done at The Hague, the twenty-fourth day of March, one thousand nine hundred and twenty-two.

(*s.*) LODER,
President.
(*s.*) A. HAMMARSKJÖLD,
Registrar.

ANNEX IV

MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING A LETTER FROM THE SECRETARY OF STATE

February 24, 1923.—Read; referred to the Committee on Foreign Relations and ordered to be printed.

The White House, Washington, February 24, 1923.

To the Senate:

There has been established at The Hague a Permanent Court of International Justice for the trial and decision of international causes by judicial methods, now effective through the ratification by the signatory powers of a special protocol. It is organized and functioning. The United States is a competent suitor in the court, through provision of the statute creating it, but that relation is not sufficient for a Nation long committed to the peaceful settlement of international controversies. Indeed, our Nation had a conspicuous place in the advocacy of such an agency of peace and international adjustment, and our deliberate public opinion of today is overwhelmingly in favor of our full participation, and the attending obligations of maintenance and the furtherance of its prestige. It is for this reason that I am now asking for the consent of the Senate to our adhesion to the protocol.

With this request I am sending to the Senate a copy of the letter addressed to me by the Secretary of State, in which he presents in detail the history of the establishment of the court, takes note of the objection to our adherence because of the court's organization under the auspices of the League of Nations, and its relation thereto, and indicates how, with certain reservations, we may fully adhere and participate, and remain wholly free from any legal relation to the league or assumption of obligation under the covenant of the league.

I forbear repeating the presentation made by the Secretary of State, but there is one phase of the matter not covered in his letter with which I choose frankly to acquaint the Senate. For a long period, indeed, ever since the International Conference on the Limitation of

Armament, the consideration of plans under which we might adhere to the protocol has been under way. We were unwilling to adhere unless we could participate in the selection of judges; we could not hope to participate with an American accord if aherence involved any legal relation to the league. These conditions, there is good reason to believe, will be acceptable to the signatory powers, though nothing definitely can be done until the United States tenders adhesion with these reservations. Manifestly the Executive can not make this tender until the Senate has spoken its approval. Therefore, I most earnestly urge your favorable advice and consent. I would rejoice if some action could be taken, even in the short period which remains of the present session.

It is not a new problem in international relationship, it is wholly a question of accepting an established institution of high character, and making effective all the fine things which have been said by us in favor of such an agency of advanced civilization. It would be well worth the while of the Senate to make such special effort as is becoming to record its approval. Such action would add to our own consciousness of participation in the fortunate advancement of international relationship, and remind the world anew that we are ready for our proper part in furthering peace and adding to stability in world affairs.

WARREN G. HARDING.

State Department, Washington, February 17, 1923.

My Dear Mr. President: Referring to our interviews with respect to the advisability of action by this Government in order to give its adhesion, upon appropriate conditions, to the protocol establishing the Permanent Court of International Justice, I beg leave to submit the following considerations:

From its foundation, this Government has taken a leading part in promoting the judicial settlement of international disputes. Prior to the first peace conference at The Hague in 1899 the United States had participated in 57 arbitrations, 20 of which were with Great Britain. The President of the United States had acted as arbitrator between other nations in five cases, and ministers of the United States, or other persons designated by this Government, had acted as arbitrator or umpire in seven cases. In 1890 the Congress adopted a concurrent resolution providing—

That the President be, and is hereby, requested to invite, from time

to time, as fit occasions may arise, negotiations with any Government with which the United States has or may have diplomatic relations, to the end that any differences or disputes arising between the two Governments which can not be adjusted by diplomatic agency may be referred to arbitration and be peacefully adjusted by such means (Cong. Rec., 51st Cong., 1st sess., pt. 3, vol. 21, p. 2986).

In his instructions to the delegates of this Government to the first peace conference at The Hague, Secretary Hay said:

Nothing can secure for human government and for the authority of law which it represents so deep a respect and so firm a loyalty as the spectacle of sovereign and independent States, whose duty it is to prescribe the rules of justice and impose penalties upon the lawless, bowing with reverence before the august supremacy of those principles of right which give to law its eternal foundation.

A plan for a permanent international tribunal accompanied these instructions.

At that conference there was adopted a "convention for the pacific settlement of international disputes" which provided for a Permanent Court of Arbitration. This organization, however, while called a permanent court, really consists of an eligible list of persons designated by the contracting parties, respectively, from whom tribunals may be constituted for the determination of such controversies as the parties concerned may agree to submit to them.

In 1908 and 1909 the United States concluded 19 general conventions of arbitration which, in accordance with The Hague conventions, provided for arbitration by special agreement of differences which are of a legal nature or which relate to the interpretation of treaties, and which it may not have been possible to settle by diplomacy, provided that the differences do not affect the vital interest, the independence, or the honor of the two contracting States and do not concern the interests of third parties. Moreover since the first peace conference at The Hague a number of conventions have been concluded by this Government submitting to arbitration questions of great importance.

It is believed that the preponderant opinion in this country has not only favored the policy of judicial settlement of justiciable international disputes through arbitral tribunals specially established, but it has also strongly desired that a permanent court of international justice should be established and maintained. In his instructions to the delegates of the United States to the second peace conference held at The Hague in 1907, Secretary Root emphasized the importance of the establishment

of such a tribunal in conformity with accepted judicial standards. He said:

It should be your effort to bring about in the second conference a development of The Hague tribunal into a permanent tribunal composed of judges who are judicial officers and nothing else, who are paid adequate salaries, who have no other occupation, and who will devote their entire time to the trial and decision of international causes by judicial methods and under a sense of judicial responsibility. These judges should be so selected from the different countries that the different systems of law and procedure and the principal languages shall be fairly represented. The court should be of such dignity, consideration, and rank that the best and ablest jurists will accept appointment to it, and that the whole world will have absolute confidence in its judgment.

The second peace conference discussed a plan looking to the attainment of this object, but the project failed because an agreement could not be reached with respect to the method of selecting judges. The conference adopted the following recommendation:

The conference recommends to the signatory powers the adoption of the project hereto annexed of a convention for the establishment of a court of arbitral justice and its putting into effect as soon as an accord shall be reached upon the choice of the judges and the constitution of the court.

The covenant of the League of Nations provided, in article 14, that the council of the league should formulate and submit to the members of the league plans for the establishment of a Permanent Court of International Justice, which should be competent to hear and determine any dispute of an international character which the parties thereto should submit to it and which also might give an advisory opinion upon any dispute or question referred to it by the council or by the assembly of the league. This provision of the covenant, it may be said, did not enter into the subsequent controversy with respect to participation by this Government in the League of Nations; on the contrary, it is believed that this controversy reflected but little, if any, divergence of view in this country with respect to the advisability of establishing a permanent international court.

Pursuant to the direction contained in the article above quoted, the council of the league appointed an advisory committee of jurists which sat at The Hague in the summer of 1920 and formulated a plan for the establishment of such a court. Hon. Elihu Root was a member of that committee. It recommended a plan which was subsequently ex-

amined by the council and assembly of the league; and after certain amendments had been made, the statute constituting the Permanent Court of International Justice was adopted by the assembly of the league on December 13, 1920.

While these steps were taken under the auspices of the league the statute constituting the Permanent Court of International Justice did not become effective upon its adoption by the assembly of the league. On the contrary, it became effective by virtue of the signature, and ratification by the signatory powers, of a special protocol. The reason for this procedure was that, although the plan of the court was prepared under article 14 of the covenant, the statute went beyond the terms of the covenant, especially in making the court available to States which were not members of the League of Nations. Accordingly, a protocol of signature was prepared by which the signatory powers declared their acceptance of the adjoined statute of the Permanent Court of International Justice. The permanent court thus established by the signatory powers under the protocol with the statute annexed is now completely organized and at work.

The statute of the court provides for the selection of the judges; defines their qualifications, and prescribes the jurisdiction of the court and the procedure to be followed in litigation before it.

The court consists of 15 members, 11 judges, called "ordinary judges," and 4 deputy judges. The 11 judges constitute the full court. In case they can not all be present, deputies are to sit as judges in place of the absentees; but, if 11 judges are not available, 9 may constitute a quorum. It is provided that the judges shall be elected regardless of their nationality from amongst persons of high moral character, possessing the qualifications required in their respective countries for appointments to the highest judicial offices, or are jurisconsults of recognized competence in international law. The judges are elected by the council and assembly of the league, each body proceeding independently. The successful candidate must obtain an absolute majority of votes in each body. The judges are elected for nine years and are eligible for re-election. The ordinary judges are forbidden to exercise any political or administrative function. This provision does not apply to the deputy judges, except when performing their duties on the court.

The jurisdiction of the court comprises all cases which the parties refer to it and all matters specially provided for in treaties and conventions in force.

Provision has also been made so that any signatory power, if it desires, may in signing the protocol accept as compulsory "*ipso facto* and

without special convention" the jurisdiction of the court in all or any of the classes of legal disputes concerning (a) the interpretation of a treaty; (b) any question of international law; (c) the existence of any fact which, if established, would constitute a breach of an international obligation, and (d) the nature or extent of the reparation to be made for the breach of an international obligation.

This is an entirely optional clause and unless it is signed the jurisdiction of the court is not obligatory.

The first election of judges of the court took place in September, 1921. The 11 ordinary judges are the following: Viscount Robert Bannatyne Finlay, Great Britain; B. C. J. Loder, Holland; Ruy Barbosa, Brazil; D. J. Nyholm, Denmark; Charles Andre Weiss, France; John Bassett Moore, United States; Antonio Sanchez de Bustamente, Cuba; Rafael Altamira, Spain; Yorozu Oda, Japan; Dionisio Anzilotti, Italy, and Max Huber, Switzerland. The four deputies are: Michailo Yovanovitch, Serb-Croat-Slovene State; F. V. N. Beichmann, Norway; Demetre Negulesco, Rumania, and Chung-Hui Wang, China.

It will be noted that one of the most distinguished American jurists has been elected a member of the court, Hon. John Bassett Moore.

In considering the question of participation of the United States in the support of the permanent court, it may be observed that the United States is already a competent suitor in the court. The Statute expressly provides that the court shall be open not only to members of the league but to States mentioned in the annex to the covenant.

But it is not enough that the United States should have the privileges of a suitor. In view of the vast importance of provisions for the peaceful settlement of international controversies, of the time-honored policy of this Government in promoting such settlements, and of the fact that it has at last been found feasible to establish upon a sound basis a permanent international court of the highest distinction and to invest it with a jurisdiction which conforms to American principles and practice, I am profoundly convinced that this Government, under appropriate conditions, should become a party to the convention establishing the court and should contribute its fair share of the expense of maintenance.

I find no insuperable obstacle in the fact that the United States is not a member of the League of Nations. The statute of the court has various procedural provisions relating to the league. But none of these provisions save those for the election of judges, to which I shall presently refer, are of a character which would create any difficulty in the support of the court by the United States despite

its nonmembership in the league. None of these provisions impair the independence of the court. It is an establishment separate from the league, having a distinct legal status resting upon the protocol and statute. It is organized and acts in accordance with judicial standards, and its decisions are not controlled or subject to review by the League of Nations.

In order to avoid any question that adhesion to the protocol and acceptance of the statute of the court would involve any legal relation on the part of the United States to the League of Nations or the assumption of any obligations by the United States under the covenant of the League of Nations, it would be appropriate, if so desired, to have the point distinctly reserved as a part of the terms of the adhesion on the part of this Government.

Again, as already noted, the signature of the protocol and the consequent acceptance of the statute, in the absence of assent to the optional compulsory clause, does not require the acceptance by the signatory powers of the jurisdiction of the court except in such cases as may thereafter be voluntarily submitted to the court. Hence, in adhering to the protocol, the United States would not be required to depart from the position, which it has thus far taken, that there should be a special agreement for the submission of a particular controversy to arbitral decision.

There is, however, one fundamental objection to adhesion on the part of the United States to the protocol and the acceptance of the statute of the court in its present form. That is, that under the provisions of the statute only members of the League of Nations are entitled to a voice in the election of judges. The objection is not met by the fact that this Government is represented by its own national group in The Hague Court of Arbitration and that this group may nominate candidates for election as judges of the Permanent Court of International Justice. This provision relates simply to the nomination of candidates; the election of judges rests with the council and assembly of the League of Nations. It is no disparagement of the distinguished abilities of the judges who have already been chosen to say that the United States could not be expected to give its formal support to a permanent international tribunal in the election of the members of which it had no right to take part.

I believe that the validity of this objection is recognized and that it will be feasible to provide for the suitable participation by the United States in the election of judges, both ordinary and deputy judges, and in the filling of vacancies. The practical advantage of

the present system of electing judges by the majority of votes of the council and assembly of the league acting separately is quite manifest. It was this arrangement which solved the difficulty, theretofore appearing almost insuperable, of providing an electoral system conserving the interests of the powers, both great and small. It would be impracticable, in my judgment, to disturb the essential features of this system. It may also be observed that the members of the council and assembly of the league in electing the judges of the court do not act under the covenant of the League of Nations, but under the statute of the court and in the capacity of electors performing duties defined by the statute. It would seem to be reasonable and practicable that in adhering to the protocol and accepting the statute this Government should prescribe as a condition that the United States, through representatives designated for the purpose, should be permitted to participate, upon an equality with other States members of the League of Nations, in all proceedings, both of the council and of the assembly of the league, for the election of judges or deputy judges of the court or for the filling of vacancies in these offices.

As the statute of the court prescribes its organization, competence, and procedure, it would also be appropriate to provide, as a condition of the adhesion of the United States, that the statute should not be amended without the consent of the United States.

The expenses of the court are not burdensome. Under the statute of the court, these expenses are borne by the League of Nations; the league determines the budget and apportions the amount among its members. I understand that the largest contribution by any State is but little more than $35,000 a year. In this matter also the members of the council and assembly of the league do not act under the covenant of the league but under the statute of the court. The United States, if it adhered to the protocol, would of course desire to pay its fair share of the expense of maintaining the court. The amount of this contribution would, however, be subject to determination by Congress and to the making of appropriations for the purpose. Reference to this matter also might properly be made in the instrument of adhesion.

Accordingly I beg leave to recommend that, if this course meets with your approval, you request the Senate to take suitable action advising and consenting to the adhesion on the part of the United States to the protocol of December 16, 1920, accepting the adjoined statute of the Permanent Court of International Justice, but not the

optional clause for compulsory jurisdiction; provided, however, that such adhesion shall be upon the following conditions and understandings to be made a part of the instrument of adhesion:

I. That such adhesion shall not be taken to involve any legal relation on the part of the United States to the League of Nations or the assumption of any obligations by the United States under the covenant of the League of Nations constituting Part I of the treaty of Versailles.

II. That the United States shall be permitted to participate through representatives designated for the purpose and upon an equality with the other States members, respectively, of the council and assembly of the League of Nations in any and all proceedings of either the council or the assembly for the election of judges or deputy judges of the Permanent Court of International Justice, or for the filling of vacancies.

III. That the United States will pay a fair share of the expenses of the court as determined and appropriated from time to time by the Congress of the United States.

IV. That the statute for the Permanent Court of International Justice adjoined to the protocol shall not be amended without the consent of the United States.

If the Senate gives its assent upon this basis, steps can then be taken for the adhesion of the United States to the protocol in the manner authorized. The attitude of this Government will thus be defined and communicated to the other signatory powers whose acquiescence in the stated conditions will be necessary.

Copies of the resolution of the assembly of the League of Nations of December 13, 1920, the protocol of December 16, 1920, and the statute of the court are inclosed herewith.

I am, my dear Mr. President, faithfully yours,

CHARLES E. HUGHES.

ANNEX V

Text of Swanson Resolution (*S. Res. 220*)

Whereas the President, under date of February 24, 1923, transmitted a message to the Senate accompanied by a letter from the Secretary of State, dated February 17, 1923, asking the favorable advice and consent of the Senate to the adhesion on the part of the United States to the protocol of December 16, 1920, of signature of the statute for the Permanent Court of International Justice, set out in the said message of the President (without accepting or agreeing to the optional clause for compulsory jurisdiction contained therein), upon the conditions and understandings hereafter stated, to be made a part of the instrument of adhesion: Therefore be it

Resolved (two-thirds of the Senators present concurring), That the Senate advise and consent to the adhesion on the part of the United States to the said protocol of December 16, 1920, and the adjoined statute for the Permanent Court of International Justice (without accepting or agreeing to the optional clause for compulsory jurisdiction contained in said statute), and that the signature of the United States be affixed to the said protocol subject to the following reservations and understandings, which are hereby made a part and condition of this resolution, namely:

1. That such adhesion shall not be taken to involve any legal relation on the part of the United States to the League of Nations or the assumption of any obligations by the United States under the covenant of the League of Nations constituting part 1 of the treaty of Versailles.

2. That the United States shall be permitted to participate through representatives designated for the purpose and upon an equality with the other States, members, respectively, of the council and assembly of the League of Nations, in any and all proceedings of either the council or the assembly for the election of judges or deputy judges of the Permanent Court of International Justice or for the filling of vacancies.

3. That the United States will pay a fair share of the expenses

of the court as determined and appropriated from time to time by the Congress of the United States.

4. That the statute for the Permanent Court of International Justice adjoined to the protocol shall not be amended without the consent of the United States.

5. That the United States shall be in no manner bound by an advisory opinion of the Permanent Court of International Justice not rendered pursuant to a request in which it, the United States, shall expressly join in accordance with the statute for the said court adjoined to the protocol of signature of the same to which the United States shall become signatory.

The signature of the United States to the said protocol shall not be affixed until the powers signatory to such protocol shall have indicated, through an exchange of notes, their acceptance of the foregoing reservations and understandings as a part and a condition of adhesion by the United States to the said protocol.

ANNEX VI

Text of Lodge Resolution (*S. J. Res. 122*)

Requesting the President to propose the calling of a Third Hague Conference for the establishment of a World Court of International Justice

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the President be, and he is hereby, respectfully requested to propose on behalf of the Government of the United States to the nations of the world the calling of a Third Hague Conference and to recommend to such conference the following statute for the establishment of a World Court of International Justice:

STATUTE FOR THE WORLD COURT

Article 1. A World Court is hereby established. This court shall be in addition to the Court of Arbitration organized by the conventions of The Hague of 1899 and 1907, and to the special tribunals of arbitration to which states are always at liberty to submit their disputes for settlement.

Chapter 1—*Organization of the Court*

Article 2. The World Court shall be composed of a body of independent judges, elected regardless of their nationality from amongst persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are juris-consults of recognized competence in international law.

Article 3. The members of the court shall be elected by an electorial commission which shall consist of a general committee composed of representatives designated for that purpose by the signatory powers, and a special committee composed of representatives designated for that purpose by the United States of America, the British Empire, France, Italy, and Japan, together with the representatives of five other signatory powers, which powers shall be selected by the general committee by a majority vote from time to time in its discretion. Each signatory power so represented shall have only one vote and only one representative in each of these committees.

The electoral commission shall meet as occasion may require, at The Hague or at such other place, and at such times as may be decided upon by a majority of the signatory powers, or of their representatives in the general committee.

A regular meeting of the electoral commission shall be held within three months preceding the expiration of the term of office of a member of the court, and in case a vacancy occurs in the membership of the court through the death or resignation or removal of a judge, a meeting shall be held as soon as practicable after such vacancy occurs.

The electoral commission shall have a permanent secretary who may be the secretary general of The Hague Permanent Court of Arbitration and shall maintain a permanent office in the international bureau of the court, as constituted under The Hague Convention of 1907 for the Pacific Settlement of International Disputes.

The court shall consist of sixteen members—twelve judges and four deputy judges. The number of judges and deputy judges may hereafter be increased by a two-thirds vote of all the members of the general committee upon the proposal of two-thirds of all the members of the special committee to a total of fifteen judges and of six deputy judges.

Article 4. The judges and deputy judges of the court shall be selected from a list of persons nominated by the national groups in the Permanent Court of Arbitration, in accordance with the following provisions:

In the case of states not represented in the Permanent Court of Arbitration, the lists of candidates shall be drawn up by national groups appointed for this purpose by their governments under the same conditions as those prescribed for members of the Permanent Court of Arbitration by article 44 of the Convention of The Hague of 1907 for the Pacific Settlement of International Disputes.

Article 5. At least three months before the date of the election the secretary general of the Permanent Court of Arbitration shall address a written request to the members of the Permanent Court of Arbitration belonging to the states participating and to the persons appointed under paragraph 2 of article 4, inviting them to undertake, within a given time, by national groups, the nomination of persons in a position to accept the duties of a member of the court.

No group may nominate more than four persons, not more than two of whom shall be of their own nationality. In no case must the number of candidates nominated be more than double the number of seats to be filled.

Article 6. Before making these nominations each national group is recommended to consult its highest court of justice, its legal faculties and schools of law, and its national academies and national sections of international academies devoted to the study of law.

Article 7. The Secretary General of the Permanent Court of Arbitration shall prepare a list in alphabetical order of all the persons thus nominated. Save as provided in article 12, paragraph 2, these shall be the only persons eligible for appointment.

The Secretary General shall submit this list to each of the signatory powers.

Article 8. The general committee and the special committee of the electoral commission shall proceed independently of one another to elect, firstly, the judges, then the deputy judges.

Article 9. At every election the electors shall bear in mind that not only should all the persons appointed as members of the court possess the qualifications required, but the whole body also should represent the main forms of civilization and the principal legal systems of the world.

Article 10. Those candidates who obtain an absolute majority of votes in the general committee and in the special committee of the electoral commission shall be considered as elected.

In the event of more than one candidate of the same nationality being elected by the votes of both committees the eldest of these only shall be considered as elected.

There shall never be more than one judge or deputy judge of the same nationality at the same time.

Article 11. If, after the first meeting held for the purpose of the election, one or more seats remain to be filled, a second and if necessary a third meeting shall take place.

Article 12. If, after the third meeting, one or more seats still remain unfilled, a joint conference consisting of six members, three appointed by the general committee and three by the special committee, may be formed at any time at the request of either committee for the purpose of choosing one name for each seat still vacant to submit to the committees for their respective acceptance.

If the conference is unanimously agreed upon any person who fulfils the required conditions he may be included in its list, even though he was not included in the list of nominations referred to in articles 4 and 5.

If the joint conference is satisfied that it will not be successful in procuring an election, those members of the court who have already been

appointed shall, within a period to be fixed by the special committee, proceed to fill the vacant seats by selection from amongst those candidates who have obtained votes either in the general committee or in the special committee.

In the event of an equality of votes amongst the judges, the eldest judge shall have a casting vote.

Article 13. The judges shall be elected for a term of nine years, to begin on a date fixed by the electoral commission at each election. As soon as possible after the first election the judges shall divide themselves by lot, as equally as may be, into three classes. The seats of the judges of the first class shall be vacated at the expiration of the third year, and of the second class at the expiration of the sixth year, and of the third class at the expiration of the ninth year, so that one-third may be chosen every third year.

The deputy judges shall be elected for a term of six years, to begin on a date fixed by the electoral commission at each election.

As soon as possible after the first election the deputy judges shall divide themselves by lot, as equally as may be, into two classes. The seats of the deputy judges of the first class shall be vacated at the expiration of the third year, and of the second class at the expiration of the sixth year, so that one-half may be chosen every third year.

The judges and deputy judges may be reelected.

Though replaced, they shall finish any cases which have been heard but not decided by them.

Article 14. Vacancies which may occur shall be filled by the same method as that laid down for the first election. A member of the court elected to replace a member whose period of appointment had not expired will hold the appointment for the remainder of his predecessor's term.

Article 15. Deputy judges shall be called upon to sit in the order laid down in a list.

This list shall be prepared by the court and shall have regard, firstly, to priority of election; and, secondly, to age.

Article 16. The judges of the court during their term of office may not exercise any political or administrative function. This provision does not apply to the deputy judges except when performing their duties on the court.

Any doubt on this point is settled by the decision of the court.

Article 17. No member of the court can act as agent, counsel, or advocate in any case of an international nature. This provision only

applies to the deputy judges as regards cases in which they are called upon to exercise their functions on the court.

No member may participate in the decision of any case in which he has previously taken an active part as agent, counsel, or advocate for one of the contesting parties before an international tribunal or commission.

Any doubt on this point is settled by the decision of the court.

Article 18. A judge or deputy judge can be dismissed when in the unanimous opinion of the other judges he has ceased to fulfill the required conditions.

A member of the court may be impeached by a two-thirds vote of the special committee for failure to fulfill the conditions required of a member of the court, and upon such impeachment, and after an opportunity to be heard has been given, he may be removed from office by a two-thirds vote of the general committee.

Formal notification thereof shall be made by the registrar or by the secretary of the electoral commission to the signatory powers.

This notification makes the place vacant.

Article 19. The judges and deputy judges, when engaged on the business of the court, shall enjoy diplomatic privileges and immunities.

Article 20. Every judge and deputy judge, before taking up his duties, shall make a solemn declaration in open court that he will exercise his powers impartially and conscientiously.

Article 21. The court shall elect its president and vice president for three years; they may be reelected.

It shall appoint its registrar.

The duties of registrar of the court shall not be deemed incompatible with those of secretary general of the Permanent Court of Arbitration.

Article 22. The seat of the court shall be established at The Hague.

The president and registrar shall reside at the seat of the court.

Article 23. A session of the court shall be held every year.

Unless otherwise provided by rules of court, this session shall begin on the 15th of June and shall continue for so long as may be deemed necessary to finish the cases on the list.

The president may summon an extraordinary session of the court whenever necessary, and an extraordinary session of the court must be convened pursuant to a request made in writing by any two of the signatory powers to the registrar, who shall thereupon notify the members of the court.

Article 24. If for some special reason a member of the court con-

siders that he should not take part in the decision of a particular case he shall so inform the president.

If the president considers that for some special reason one of the members of the court should not sit on a particular case, he shall give him notice accordingly.

If in any such case the member of the court and the president disagree, the matter shall be settled by the decision of the court.

Article 25. The full court shall sit except when it is expressly provided otherwise.

If twelve judges can not be present, the number shall be made up by calling on deputy judges to sit.

If, however, twelve judges are not available, a quorum of nine judges shall suffice to constitute the court.

Article 26. With a view to the speedy despatch of business, the court shall form annually a chamber composed of three judges who, at the request of the contesting parties, may hear and determine cases by summary procedure.

Article 27. The court shall frame rules for regulating its procedure. In particular, it shall lay down rules for summary procedure.

Article 28. Judges of the nationality of each contesting party shall retain their right to sit in the case before the court.

If the court includes upon the bench a judge of the nationality of one of the parties only, the other party may select from among the deputy judges a judge of its nationality, if there be one. If there should not be one, or if the party prefers, it may choose a judge, preferably from among those persons who have been nominated as candidates as provided in articles 4 and 5.

If the court includes upon the bench no judge of the nationality of the contesting parties, each of these may proceed to select or choose a judge as provided in the preceding paragraph.

Should there be several parties in the same interest, they shall, for the purpose of the preceding provisions, be reckoned as one party only. Any doubt upon this point is settled by the decision of the court.

Judges selected or chosen as laid down in paragraphs 2 and 3 of this article shall fulfill the conditions required by articles 2, 16, 17, 20, and 24 of this statute. They shall take part in the decision on an equal footing with their colleagues.

Article 29. The judges shall receive an annual indemnity of 15,000 Dutch florins. This indemnity must not be decreased during the period of a judge's appointment.

The president shall receive a special annual grant during his period of office of 45,000 Dutch florins.

The vice president shall receive a grant for the actual performance of his duties of 150 Dutch florins per day for a period not exceeding two hundred days, making a maximum of 30,000 Dutch florins per annum; the judges shall receive a grant for the actual performance of their duties of 100 Dutch florins per day for a period not exceeding two hundred days, making a maximum of 20,000 Dutch florins per annum; and the deputy judges a grant for actual performance of their duties of 150 Dutch florins per day for a period not exceeding two hundred days, making a maximum of 30,000 Dutch florins per annum. The duty allowances are payable from the day of departure until the return of the beneficiary.

Traveling expenses incurred in the performance of their duties shall be refunded to judges and deputy judges who do not reside at the seat of the court.

An additional allowance of 50 Dutch florins per day is assigned for each day of actual presence at The Hague to the vice president, judges, and deputy judges.

Grants due to judges selected or chosen as provided in article 28 shall be at the same rate as deputy judges.

The salary of the registrar shall be decided by the court.

The general committee shall lay down, on the proposal of the special committee, a special regulation fixing the conditions under which retiring pensions may be given to the personnel of the court.

Article 30. The expenses of the court shall be borne by the signatory powers in such a manner as shall be decided by a majority of the general committee.

Chapter II—*Competence of the Court*

Article 31. Only states can be parties in cases before the court.

Article 32. The court shall be open of right to the signatory powers.

The conditions under which the court shall be open to other states shall, subject to the special provisions contained in treaties in force, be laid down by the general committee, but in no case shall such provisions place the parties in a position of inequality before the court.

When a state which is not a signatory power is a party to a dispute, the court will fix the amount which that party is to contribute toward the expenses of the court.

Article 33. The jurisidiction of the court comprises all cases which the parties refer to it and all matters over which its jurisdiction is specially provided for in treaties and conventions in force between the parties to the case submitted.

The signatory powers may, either when signing or ratifying the protocol to which the present statute is adjoined, or at a later moment, declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the court in all or any of the classes of legal disputes concerning:

(a) The interpretation of a treaty.

(b) Any question of international law.

(c) The existence of any fact which, if established, would constitute a breach of an international obligation.

(d) The nature or extent of the reparation to be made for the breach of an international obligation.

The declaration referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain states or for a certain time.

In the event of a dispute as to whether the court has jurisdiction under such declaration, the matter shall be settled by the decision of the court.

Article 34. When a treaty or convention in force provides for the reference of a matter to a tribunal to be instituted by the League of Nations, the court may take jurisdiction of such matter as between the parties to such treaty or convention.

Article 35. The court, within the limits of its jurisdiction, shall apply in the following order:

1. International conventions, whether general or particular, establishing rules expressly recognized by the contesting states.

2. International custom, as evidence of a general practice accepted as law.

3. The general principles of law recognized by civilized nations.

4. Subject to the provisions of article 56, judicial decisions and the teachings of the most highly qualified publicists of the various nations as subsidiary means for the determination of rules of law.

In cases submitted to the court under special agreements, the court shall be bound by the terms of submission.

Article 36. The official languages of the court shall be French and English. If the parties agree that the case shall be conducted in French, the judgment will be delivered in French. If the parties agree

that the case shall be conducted in English, the judgment will be delivered in English.

In the absence of an agreement as to which language shall be employed, each party may, in the pleadings, use the language which it prefers. The decision of the court will be given in French and English. In this case the court will at the same time determine which of the two texts shall be considered as authoritative.

The court may, at the request of the parties, authorize a language other than French or English to be used.

Article 37. Cases are brought before the court, by the notification of the special agreement, except that cases in which the parties have expressly accepted compulsory jurisdiction may be brought before the court by a written application addressed to the registrar. In all cases the subject of the dispute and the contesting parties must be clearly indicated.

The registrar shall forthwith communicate the application to all concerned.

He shall also notify the signatory powers.

Article 38. The court shall have the power, to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to reserve the respective rights of either party.

Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and the signatory powers.

Article 39. The parties shall be represented by agents.

They may have the assistance of counsel or advocates before the court.

Article 40. The procedure shall consist of two parts, written and oral.

The written proceedings shall consist of the communication to the judges and to the parties of cases, countercases, and, if necessary, replies; also all papers and documents in support.

These communications shall be made through the registrar, in the order and within the time fixed by the court, or as may be provided for in the special agreement of submission.

A certified copy of every document produced by one party shall be communicated to the other party.

The oral proceedings shall consist of the hearing by the court of witnesses, experts, agents, counsel, and advocates.

The agent and counsel of the parties on each side are authorized to present orally and in writing to the court arguments in support or in defense of each case.

The court shall decide all questions and matters submitted upon such evidence and information as may be furnished by the parties concerned.

Article 41. For the service of all notices upon persons other than the agents, counsel, and advocates the court shall apply direct to the government of the State upon whose territory the notice has to be served.

The same provision shall apply whenever steps are to be taken to procure evidence on the spot.

Article 42. Subject to the provisions of article 45, the hearings shall be under the direction of the president; or in his absence, of the vice president. If both are absent, the senior judge shall preside.

All rulings of the court shall be by majority vote of the judges present.

Article 43. The hearing in court shall be public, unless the court at the written request of one of the parties, accompanied by a statement of his reasons, shall otherwise decide.

Article 44. Minutes shall be made at each hearing and, after approval by the agents, signed by the registrar and the president.

These minutes shall be the only authentic record, except that if an official verbatim report of the hearing has been made, it shall also form part of the official authentic record.

Article 45. The court shall make orders for the conduct of the case, shall decide the form and time in which each party must conclude its arguments, and make all arrangements connected with the taking of evidence, subject to any conditions imposed by the special agreement.

Article 46. The court may, even before a hearing begins, call upon the agents to produce any document or to supply any explanations. Formal note shall be taken of any refusal.

Article 47. The court, with the written approval of the parties, may, at any time, intrust any individual, body, bureau, commission, or other organization that it may select, with the task of carrying out an inquiry or giving an expert opinion.

Article 48. During the hearing in court, the judges may put any questions, considered by them to be necessary, to the witnesses, agents, experts, advocates, or counsel. The agents, advocates, and counsel shall have the right to ask, through the president, any questions that the court considers useful.

Article 49. After the Court has received the proofs and evidence within the time specified for the purpose, it may refuse to accept any

further oral or written evidence that one party may desire to present unless the other side consents.

Article 50. Whenever one of the parties to a case which has been regularly brought before the court shall not appear before the court, or shall fail to defend his case, the other party may call upon the court to decide in favor of his claim.

The court must, before doing so, satisfy itself not only that it has jurisdiction in accordance with articles 33 and 34, but also that the claim is well founded in fact and law.

Article 51. When, subject to the control of the court, the agents, advocates, and counsel have completed their presentation of the case, the president shall declare the hearing closed.

The court shall withdraw to consider the judgment.

The deliberations of the court shall take place in private and remain secret except in so far as it may be necessary to disclose them for a dissenting opinion or for the removal or impeachment of a judge.

Article 52. All questions shall be decided by a majority of the judges present at the hearings.

In the event of an equality of votes, the president or acting president shall have a casting vote.

Article 53. The judgment shall state the reasons on which it is based.

It shall contain the names of the judges who have taken part in the decision.

Article 54. If the judgment does not represent in whole or in part the unanimous opinion of the judges, dissenting judges are entitled to deliver separate opinions.

Article 55. The judgment shall be signed by the President and by the registrar. It shall be read in open court, due notice having been given to the agents.

Article 56. The decision of the court has no binding force except between the parties and in respect of that particular case.

Article 57. The judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the court shall construe it upon the request of any party.

Article 58. An application for revision of a judgment can be made only when the court has applied in its decision a theory of international law which any general conference of states has refused to recognize as a rule of international law, or when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the court and also to the

party claiming revision, always provided that such ignorance was not due to negligence.

The proceedings for revision on the discovery of a new fact will be opened by a judgment of the court expressly recording the existence of the new fact, recognizing that it has such a character as to lay the case open to revision, and declaring the application admissible on this ground.

The court may require previous compliance with the terms of the judgment before it admits proceedings in revision on account of a new fact.

The application for revision must be made at latest within six months of the discovery of the new fact.

No application for revision may be made after the lapse of ten years from the date of the sentence.

Article 59. Should a state consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the court to be permitted to intervene as a third party.

It will be for the court to decide upon this request.

Article 60. Whenever the construction of a convention to which states other than those concerned in the case are parties is in question, the registrar shall notify all such states forthwith.

Every state so notified has the right to intervene in the proceedings, but if it uses this right, the construction given by the judgment will be equally binding upon it.

Article 61. Unless otherwise decided by the court, each party shall bear its own costs.

Chapter IV—*Definitions and Jurisdictional Limitations*

Article 62. The word "state" as used in this statute means only a fully self-governing state, and does not include any dominion, colony, or other component part of a state.

Article 63. The words "signatory powers" mean the states which sign or adhere to the protocol attached to this statute.

Article 64. A signatory power may withdraw from the court and terminate its obligations under this statute after giving two years' notice of its intention to do so to the secretary of the electoral commission or to the other signatory powers.

Article 65. The court shall not have jurisdiction to render advisory opinions on any question which affects the admission of aliens into

the United States, or the admission of aliens to the educational institutions of the several States, or the territorial integrity of the several States or of the United States, or concerning the question of the alleged indebtedness or moneyed obligation of any State of the United States, or any question which depends upon or involves the maintenance of the traditional attitude of the United States concerning American questions, commonly described as the Monroe doctrine, or other purely governmental policy, or any question which is considered by the Government of the United States to be a domestic question.

Article 66. The court shall be bound by the principle that international law recognizes the authority of the laws of the United States within its own jurisdiction as applied to foreigners or to foreign-owned property therein, whether in time of peace or war.

Article 67. Before a case in which the United States is concerned can be submitted to the court a special agreement must be concluded between the United States and the other parties in interest, defining clearly the matter in dispute, the scope of the powers of the court, and the periods for the several stages of procedure, and such special agreements on the part of the United States can only be made by the President of the United States, by and with the advice and consent of the Senate thereof.

ANNEX VII

Text of Pepper Resolution (*S. Res. 234*)

Whereas the Senate has had under consideration the message from the President of the United States dated February 24, 1923, in which the Senate is asked to consent to the signature by the United States of the Protocol of December 16, 1920, establishing the Permanent Court of International Justice, and has likewise had under consideration the message from the President of the United States dated December 6, 1923, in which this proposal is again commended to the favorable consideration of the Senate; and

Whereas the proposal thus submitted and commended contemplates the signature of the Protocol by the United States upon such conditions as will enable the United States to give its adherence to the Court while remaining wholly free from any legal relationship to the League of Nations, and

Whereas it is desirable to express with greater precision the safeguards suggested in general terms in the message of President Harding: Now be it therefore

Resolved, First: That the Senate approves the pending proposal and advises the adherence of the United States to the Permanent Court of International Justice upon the terms hereinafter specified.

Second. That permission to the United States to participate in the election of future judges should, in the opinion of the Senate, take the form of an amendment to those portions of the Statute of the Court which prescribe that the election shall be by the Assembly and Council of the League of Nations.

Third. That the Senate advises the President to communicate with the States which have adhered to the Court for the purpose of securing assent to such amendments to the Protocol and the Statute as will accomplish the disassociation of the Court from the League of Nations.

Fourth. That the Senate advises and consents to the signature by the United States of the Protocol of December 16, 1920, when the same shall have been amended as specified in the first annex to this

resolution and when amendments shall have been made to the adjoined Statute as specified in the second annex hereto.

Fifth. That the signature of the United States of America shall be understood to be affixed subject to the declaration that the United States disclaims all responsibility for the exercise by the Court of the jurisdiction to render advisory opinions, and subject to the further declaration that the United States intends to adhere to the Monroe Doctrine as a national policy and assumes no obligations inconsistent therewith.

Sixth. That the signature by the United States herein referred to is a signature to the Protocol as set forth in this resolution but not to the so-called optional clause referred to in Article 36, paragraph 2, of the Statute of the Court.

Seventh. That the Senate advises the President that a Third International Conference similar to the Hague Conferences of 1899 and 1907 be called not later than the year 1926 for purposes which shall include the giving of effect to the recommendation of the Committee of Jurists upon the basis of whose report the Court was established, regarding the clarification and further development of international law, and the codification thereof.

First Annex to the Resolution—"Protocol of Signature"

"The Signatories of this Protocol, through the undersigned, duly authorized, declare their acceptance of the adjoined Statute of the Permanent Court of International Justice, and hereby declare that they accept the jurisdiction of the Court in accordance with the terms and subject to the conditions of the above-mentioned Statute.

"The present Protocol shall be deposited, after ratification, with the Secretary General of the Permanent Court of Arbitration at The Hague.

"The said Protocol shall remain open for signature by all nations generally recognized by treaty or diplomatic relations with the Signatories.

"The adjoined statute shall come into force as an amendment of or substitute for the existing statute as soon as all the Signatories of the protocol of 16 December 1920 shall have deposited their assent thereto with the Secretary General of the Permanent Court of Arbitration at The Hague in a single copy, the French and English texts of which shall both be authentic."

SECOND ANNEX TO THE RESOLUTION—A. SUBSTANTIVE AMENDMENTS TO THE ADJOINED STATUTE

(1) Strike out Article 4 and substitute a new article as follows:

"ARTICLE 4. The present judges and deputy-judges constituting the Permanent Court of International Justice shall retain their offices under the Statute of the Court."

(2) Strike out the first paragraph of Article 5 and substitute the following:

"ARTICLE 5. Vacancies which occur either by expiration of term or otherwise shall be filled by the States which at that time are Signatories to the Protocol. At least three months before the date of an election to fill any such vacancy the Secretary-General of the Permanent Court of Arbitration shall address a written request to the Members of the Permanent Court of Arbitration, inviting them to undertake, within a given time, by national groups, the nomination of persons in a position to accept the duties of a member of the Court."

(3) Strike out Article 8 and substitute a new article as follows:

"ARTICLE 8. Representatives of all the Signatories to this Protocol shall meet at such time and place as may be designated by the said Secretary General and shall proceed to an election. The representatives of all Signatories shall ballot as an electoral assembly. The States named in the Versailles Treaty as the Principal Allied and Associated Powers, together with such five of the other Signatory States as shall be selected by the Signatories shall ballot as a separate electoral council. The Assembly of Signatories and the Council of Signatories shall proceed independently of one another to elect, first the judges, then the deputy judges. In each electoral body each Signatory State shall have one vote, but not more than one vote shall be cast in either Assembly or Council by the British Empire and the States included therein."

(4) Strike out Article 10 and substitute a new article as follows:

"ARTICLE 10. Such nominee as shall receive a majority of votes in the electoral Assembly and a majority of votes in the electoral Council shall be elected a judge or deputy judge, as the case may be.

"In the event of more than one national of the same Signatory State being elected by the votes of both the Assembly and the Council, the eldest of these only shall be considered as elected."

(5) Strike out Article 34 and substitute a new article, as follows:

"ARTICLE 34. Only States can be parties in cases before the Court."

(6) Strike out Article 35 and substitute a new article as follows:

"Article 35. The Court shall be open to all States generally recognized by treaty or diplomatic relations with the Signatories.

"When a State which is not a Signatory is a party to a dispute the Court will fix the amount which that party is to contribute toward the expenses of the Court."

B. Formal Amendments to Carry the Foregoing into Effect

(1) In the following articles strike out "Assembly" (or "Assembly of the League of Nations") and "Council" (or "Council of the League of Nations") and substitute "Assembly of Signatories" or "Council of Signatories," as the case may be: Articles 3, 12, 32, and 41.

(2) In the following articles strike out "Member of the League of Nations" and substitute "Signatory State": Articles 26 and 27.

(3) In the following articles strike out "The Secretary-General of the League of Nations" and substitute "The Secretary-General of The Permanent Court of Arbitration": Articles 7 and 18.

(4) In Article 1, after "established," substitute a period for a comma and strike out "in accordance with Article 14 of the Covenant of the League of Nations."

(5) In Article 7 strike out the last six words and substitute "each of the Signatories."

(6) Transfer the last two paragraphs of Article 12 to a new article to be numbered Article 13.

(7) Strike out in Articles 12 and 31 "Articles 4 and 5," and substitue "Article 5."

(8) Strike out the first sentence of Article 14 and transfer the residue of the Article so that it shall become the last sentence in Article 5 as amended.

(9) In Article 36 strike out the first seventeen words of paragraph 2 and substitute "a State," and for the words "they recognize" in the same paragraph substitute "it recognizes."

(10) In Article 40 strike out the last paragraph.

ANNEX VIII

The Court's Jurisdiction

A.—*Peace Treaties.*

The Treaty of Versailles.—June 28th, 1919. Transit and Labour.

The Treaty of St. Germain.—September 10th, 1919. Transit, Labour and Minorities.

The Treaty of Neuilly.—September 27th, 1919. Transit, Labour and Minorities.

The Treaty of Trianon.—June 4th, 1920. Transit, Labour and Minorities.

The Treaty of Lausanne (January 30th, 1923) and annexed declarations.—July 24th, 1923. Minorities, transit; appointment of neutral members of Mixed Arbitral Tribunals; appointment of legal counsellors to Turkish courts; appointment of an umpire on compensation payable by Greece to Allied Nationals.

B.—*Clauses concerning the protection of Minorities.*

Albania	Declaration before the Council of the League of Nations.	Geneva, October 2nd, 1921.
Armenia	Treaty with the Principal Allied and Associated Powers.	Sèvres, August 10th, 1920.
Austria	Treaty with the Allied and Associated Powers (Art. 69).	St.-Germain-en-Laye, September 10th, 1919.
Bulgaria	Treaty with the Allied and Associated Powers (Art. 57).	Neuilly-sur-Seine, November 27th, 1919.
Danzig	Convention between Poland and the Free City of Danzig.	Paris, November 9th, 1920.

Esthonia	Resolution of the Council of the League of Nations.	Geneva, September, 17th, 1923.
Finland	Agreement between Finland and Sweden relating to the Aaland Islands, annexed to a Council resolution.	Paris, June 24th, 1921.
Greece	Treaty with the Principal Allied and Associated Powers.	Sèvres, August 10th, 1920.
Hungary	Treaty with the Allied and Associated Powers (Art. 60).	Trianon, June 4th, 1920.
Latvia	Declaration before the Council of the League of Nations.	Geneva, July 7th, 1923.
Lithuania	Declaration before the Council of the League of Nations.	Geneva, May 12th, 1922.
Poland	Treaty with the Principal Allied and Associated Powers.	Versailles, June 28th, 1919.
Roumania	Treaty with the Principal Allied and Associated Powers.	Paris, December 9th, 1919.
Serb-Coat-Slovene State	Treaty with the Principal Allied and Associated Powers.	St.-Germain-en-Laye, September 10th, 1919.
Czechoslovakia	Treaty with the Principal Allied and Associated Powers.	St.-Germain-en-Laye, September 10th, 1919.
Turkey	Treaty of Peace (Art. 44).	Lausanne, July 24th, 1923.

C.—*Mandates for various colonies and territories entrusted to certain Members of the League of Nations under Article 22 of the Covenant.*

South Africa (in the name of His Britannic Majesty)	Former German Protectorate of south West Africa.	Geneva, December 17th, 1920.

Australia (in the name of His Brittanic Majesty)	Former German Possessions in the Pacific situated south of the Equator and other than German Samoa and Nauru.	Geneva, December 17th, 1920.
Belgium	Part of the territory of the former Colony of German East Africa.	London, July 20th, 1922.
British Empire	Island of Nauru.	Geneva, December 17th, 1920.
" "	Western Part of the Cameroons.	London, July 20th, 1922.
" "	Part of the territory of the former Colony of German East Africa.	London, July 20th, 1922.
" "	Western Part of Togoland.	London, July 20th, 1922.
" "	Palestine.	London, July 24th, 1922.
France	Eastern Part of the Cameroons.	London, July 20th, 1922.
"	Eastern Part of Togoland.	London, July 20th, 1922.
"	Syria and Lebanon.	London, July 24th, 1922.
Japan	Former German islands in the Pacific Ocean to the north of the Equator.	Geneva, December 17th, 1920.
New Zealand (in the name of His Brittannic Majesty)	Former German Colony of Samoa.	Geneva, December 17th, 1920.

D.—*General International Agreements.*

Convention for the control of the trade in arms and ammunition.—Paris, September 10th, 1919. Provides that any dispute between the

parties shall be settled by an arbitral tribunal in conformity with the provisions of the Covenant.

Convention relating to the Liquor Traffic in Africa.—St.-Germain-en-Laye, September 10th, 1919. Provides that any dispute between the parties shall be settled by an arbitral tribunal in conformity with the provisions of the Covenant.

Convention on aerial navigation.—Paris, October 13th, 1919. Obligatory for disputes relating to its interpretation.

Convention and Statute on Freedom of Transit.—Barcelona, April 20th, 1921. Optional on disputes concerning its interpretation and application. Precedence given to the Advisory and Technical Committee of the League.

Convention and Statute on the régime of Navigable Waterways of International Concern.—Barcelona, April 20th, 1921. Optional on disputes concerning its interpretation and application. Precedence given to the Advisory and Technical Committee of the League.

Convention on the Statute of the Danube.—Paris, July 23rd, 1921. Appellate, against decisions of the International Commission.

Statute of navigation of the Elbe.—Dresden, February 22nd, 1922. Appellate on decisions of the International Commission.

Convention for the suppression of the circulation of and traffic in obscene publications.—Geneva, September 12th, 1923. Obligatory for signatories to the Court Statute; optional for others.

International Convention for the simplification of Customs Formalities.—Geneva, November 3rd, 1923. Appellate from a technical committee appointed by the League; obligatory on interpretation and application of certain provisions.

Convention and Statute on the international régime of Railways.—Geneva, December 9th, 1923. Optional.

Convention and Statute on the international régime of Maritime Ports.—Geneva, December 9th, 1923. Obligatory on equality of treatment; optional on interpretation and application.

Convention relating to the transmission in transit of Electric Power.—Geneva, December 9th, 1923. Optional.

Convention relating to the development of Hydraulic Power affecting more than one State.—Geneva, December 9th, 1923. Optional.

Convention relating to Opium Traffic.—Geneva, February 19th, 1925. Optional; in cases where the decision of the Court on questions of international law or interpretation of the convention is declared essential, obligatory.

E.—*Political Treaties (of alliance, commerce, navigation and others).*

Agreement between Finland and Sweden with regard to the Aaland Islands; Annex to Resolution of the Council of the League of Nations.—June 24th, 1921. Advisory opinions to be requested through the Council of the League.

Convention between Denmark and Norway concerning aerial navigation.—Copenhagen, July 27th, 1921. Obligatory as to its interpretation and application.

Treaty of Commerce and Navigation between Esthonia and Finland.—Helsingfors, October 29th, 1921. Optional.

Political Agreement between the Federal Republic of Austria and the Czechoslovak Republic.—Prague, December 16th, 1921. Optional.

Political Agreement between Esthonia, Finland, Latvia and Poland.—Warsaw, March 17th, 1922. Optional.

Polish-German Agreement with reference to Upper Silesia.—Geneva, May 15th, 1922. Obligatory on legislation and expropriations; intervention by League on minorities.

Commercial Convention between Switzerland and Poland.—Warsaw, June 26th, 1922. Optional.

Treaty of Commerce between Latvia and Czechoslovakia.—Prague, October 7th, 1922. Appointment of arbiter.

Treaty between Great Britain and Mesopotamia.—Bagdad, October 10th, 1922. Obligatory as to interpretation.

Treaty of Commerce between Esthonia and Hungary.—Reval, October 19th, 1922. Appointment of umpire.

Commercial Convention between the Netherlands and Czechoslovakia.—The Hague, January 20th, 1923. Obligatory.

Convention between Norway and Sweden concerning aerial navigation.—Stockholm, May 26th, 1923. Obligatory as to interpretation and application.

Treaty of Defensive Alliance between Esthonia and Latvia. Tallinn, November 1st, 1923. Optional.

Convention concerning the organization of the Tangiers Zone.—Paris, December 18th, 1923. Optional.

Treaty of Alliance and Friendship between France and Czechoslovakia.—Paris, January 25th, 1924. Optional.

Convention between Finland and Norway.—Christiania, April 28th, 1924. Optional.

Convention concerning the transfer of the Memel territory.—Paris,

May 8th, 1924. Obligatory on questions concerning law or fact; optional under clauses concerning ports and transit.

Convention between Denmark and Norway regarding Eastern Greenland.—Copenhagen, July 9th, 1924. Obligatory.

Convention between the United States of America and the Netherlands respecting the regulation of the Liquor Traffic.—Washington, August 21st, 1924. Obligatory. Not in effect pending United States' adherence to the Court.

Agreements between the Allied Governments, the German Government and the Reparations Commission.—London, August 30th, 1924. Obligatory on disputes relating to the agreement; appointment of arbitrators provided for in seven instances.

Treaty of Commerce and Navigation between Denmark and Latvia.—Riga, November 3rd, 1924. Obligatory in cases of revision of decisions of the arbitration tribunal; appointment of arbitrators.

Treaty of Commerce and Navigation between Germany and Great Britain.—London, December 2nd, 1924. Optional.

Treaty of Mutual Guarantee.—Locarno, October 16th, 1925. Obligatory on questions as to rights of parties; not yet in effect pending ratification.

F.—*Treaties of Arbitration and Conciliation.*

Agreement relating to arbitration between Austria and Hungary.—Budapest, April 10th, 1923. Optional.

Agreement for the renewal of the Arbitration Convention between the United States of America and the British Empire.—Exchange of letters; Washington, June 23rd, 1923. Not in effect, pending United States' adherence to the Court.

Agreement for the renewal of the Arbitration Convention between the United States of America and France.—Exchange of letters; Washington, July 19th, 1923. Not in effect, pending United States' adherence to the Court.

Agreement for the renewal of the Arbitration Convention between the United States of America and Japan.—Exchange of letters; Washington, August 23rd, 1923. Not in effect, pending United States' adherence to the Court.

Agreement for the renewal of the Arbitration Convention between the United States of America and Norway.—Exchange of letters; Washington, November 26th, 1923. Not in effect, pending United States' adherence to the Court.

Agreement for the renewal of the Arbitration Convention between the United States of America and the Netherlands.—Exchange of letters; Washington, February 13th, 1924. Not in effect, pending United States' adherence to the Court.

Treaty of Conciliation between Sweden and Switzerland.—Stockholm, June 2nd, 1924. Optional; preference given to a Permanent Conciliation Commission; appointment of members of the Permanent Conciliation Commission.

Treaty of Conciliation between Denmark and Switzerland.—Copenhagen, June 6th, 1924. Optional; preference given to a Permanent Conciliation Commission; appointment of members of the Permanent Conciliation Commission.

Treaty of Conciliation and Arbitration between Hungary and Switzerland.—Budapest, June 18th, 1924. Optional; obligatory if no arbitral tribunal has been constituted six months after notification.

Treaty concerning the Judicial Settlement of disputes arising between Brazil and Switzerland.—Rio de Janeiro, June 23rd, 1924. Optional; obligatory if no agreement for settlement is reached six months after notification.

Convention between Denmark and Sweden concerning the establishment of a Conciliation Commission.—Stockholm, June 27th, 1924. Optional; appointment of the chairman of the Conciliation Commission.

Convention between Denmark and Norway concerning the establishment of a Conciliation Commission.—Stockholm, June 27th, 1924. Optional; appointment of the chairman of the Conciliation Commission.

Convention between Denmark and Finland concerning the establishment of a Conciliation Commission.—Stockholm, June 27th, 1924. Optional; appointment of the chairman of the Conciliation Commission.

Treaty of Arbitration and Conciliation between Germany and Sweden. —Exchange of letters; Berlin, August 29th, 1924.

Treaty of Arbitration and Conciliation and Judicial Settlement between Italy and Switzerland.—Rome, September 20th, 1924. Appellate from the decisions of a Permanent Conciliation Commission; obligatory if within three months from notification no agreement for settlement is reached.

Treaty of Conciliation between Austria and Switzerland.—Vienna, October 11th, 1924. Optional; preference given to conciliation.

Agreement for the renewal of the Arbitration Convention between the United Kingdom and Sweden.—Exchange of letters; London, November 9th, 1924.

Treaty of Judicial Settlement between Japan and Switzerland.—Tokio, December 26th, 1924. Optional.

Treaty of Conciliation and Judicial Settlement between Belgium and Switzerland.—Brussels, February 13th, 1925. Obligatory in case of failure of conciliation and as to interpretation; appointment of the President of the Permanent Conciliation Commission.

Treaty of Conciliation and compulsory arbitration between France and Switzerland.—Paris, April 6th, 1925. Optional; preference given to a Permanent Conciliation Commission; obligatory in case of failure of conciliation, and as to the application of the Treaty.

Treaty of Conciliation and Arbitration between Czechoslovakia and Poland.—Warsaw, April 23rd, 1925. Optional; obligatory as to interpretation.

Agreement for the renewal of the Arbitration Convention between the United Kingdom and Norway.—Exchange of letters; London, May 13th, 1925.

Treaty between Germany and Czechoslovakia.—Locarno, October 16th, 1925. Optional, on questions concerning rights of parties; preference given to a Permanent Conciliation Commission. Not yet in effect, pending ratification.

Treaty between Germany and Poland.—Locarno, October 16th, 1925. Optional, on questions concerning rights of parties; preference given to a Permanent Conciliation Commission. Not yet in effect, pending ratification.

Treaty between Germany and France.—Locarno, October 16th, 1925. Optional, on questions concerning rights of parties; preference given to a Permanent Conciliation Commission. Not yet in effect, pending ratification.

Treaty between Germany and Belgium.—Locarno, October 16th, 1925. Optional on questions concerning rights of parties; preference given to a Permanent Conciliation Commission. Not yet in effect, pending ratification.

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